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Supreme Court of the United States

STACY PLATONE, Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To protect the marketplace and prevent corporate corruption, Congress enacted the Sarbanes-Oxley Act of 2002 and included protection for employees who report their reasonable beliefs of fraudulent conduct. That provision, which is codified at 18 U.S.C. § 1514A, enumerates specific fraud statutes that define the scope of the Act's whistleblower protection. The Department of Labor acknowledges that the Act contains no limitation on the type of wire and mail frauds that an employee may report without fearing reprisals. However, the Department decided in this case that the Act's protection does not extend to employees who report corporate acts of fraud when the corporation and its shareholders are not direct, economic victims of the fraud. The Department maintains that reporting a fraudulent scheme carried out *to benefit* the corporation falls outside the Act's protection.

The question presented is whether whistleblower protection under the Sarbanes-Oxley Act extends to an employee who reports his or her reasonable belief of a corporate fraud when the scheme is designed to defraud another party and not the company's shareholders.

PARTIES TO THE PROCEEDING

Petitioner Stacy Platone, an individual, was petitioner below and in this Court. In addition to Respondent United States Department of Labor, FLYi, Inc., is a party in interest in this proceeding.

During the relevant time frame, FLYi, Inc. was known as Atlantic Coast Airlines Holdings, Inc. (ACAI) and Atlantic Coast Airlines (ACA) was the sole operating business of ACAI.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Stacy Platone respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-9a) is published at 548 F.3d 322.

The opinion of the Administrative Review Board of the U.S. Department of Labor (App., *infra* 11a-45a) is unpublished.[1] The recommended decision and order of the administrative law judge of the U.S. Department of Labor (App., *infra* 46a-114a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2008. The court of appeals issued an order denying a petition for rehearing on February 2, 2009. (App., *infra* 115-116a). The United States Bankruptcy Court for the District of Delaware

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[1] Decisions of the Department's administrative review board and administrative law judges are available at http://www.oalj.dol.gov.

entered an order granting Petitioner relief from the automatic stay on April 13, 2009. (App., *infra* 117a-118a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Sarbanes-Oxley Act, 18 U.S.C. § 1514A,[2] provides in relevant part:

Whistleblower Protection for Employees of Publicly Traded Companies. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 780(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section

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[2] Section 806 of the Sarbanes-Oxley Act is specifically entitled the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002.

1341, 1343, 1344 or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344 or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

The wire fraud statute, 18 U.S.C. § 1343, provides in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or

artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT

The Department of Labor concedes that Stacy Platone reported an ongoing scheme of mail and wire fraud. However, the Respondent declined to affirm its administrative law judge's recommended decision, reasoning that the "real victim" of the fraud scheme was the Air Line Pilots Association and not the airline's shareholders. The Fourth Circuit affirmed the department's decision[3] on alternate grounds and allowed the department's interpretation, now known as the *Platone* rule, to stand.

In the three years since the department's decision, those bringing complaints under the administrative process have been denied protection for reporting similar corporate frauds. Those who brought their cases in federal courts have found a split among the courts that have been asked to apply the statute with respect to the reporting of mail or wire frauds.

The Fourth Circuit's decision in this case upheld the narrowest possible reading of the statute,

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[3] The appeals court had jurisdiction to review the Department's decision pursuant to pursuant to 18 U.S.C. § 1514A(b)(2)(A) and 49 U.S.C. § 42121(b)(4), which provides that review of the final order of the Secretary may be obtained in the court of appeals for the circuit in which the violation occurred.

indeed the Department's ruling can only be described as an administrative amendment to the statute regarding the reporting of corporate fraud. Under the Department's *Platone* rule, a corporation and its management can defraud any competitor, customer, vendor – in truth, any third party – without risking Sarbanes-Oxley liability. Under the *Platone* rule, an executive of Citibank would not be protected in reporting a scheme by his employer to raid the assets of a competitor, such as Bank of America. Likewise, the *Platone* rule would prevent courts from protecting an auditor of Pepsico who reported a boardroom scheme to steal the Coca-Cola formula.

Just as significantly, the *Platone* rule can embolden corporations to risk such fraudulent conduct knowing that the most likely source of reporting such wrongdoing – the corporation's own employees – have no legal protection for reporting the criminal conduct.

A. Statutory Background

The Sarbanes-Oxley Act of 2002 was enacted in the wake of well-publicized corporate wrongdoing by officials at Enron Corporation, MCI WorldCom, Inc., and elsewhere. The mechanism of the Act's whistleblower provision is similar to that of other public-sector protections, and Congress directed that claims pursuant to the provision would be investigated and adjudicated under the procedure previously established for claims under the Wendell

H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (2000).

It is plain from the language of the statute that Congress intended for the whistleblower provision to have a profound effect in deterring corporate wrongdoing. By using the phrase "reasonable belief" to describe the level of certainty necessary for sustaining a claim, Congress made clear its intent to protect even those employees who mistakenly concluded that such corporate conduct was illegal, so long as their beliefs were reasonable.

However, the Act's whistleblower protection has not had such an impact. Newspaper accounts have described the overwhelming lack of success claimants have had in the administrative process,[4] while legal experts have analyzed the remarkable loss rate for claimants before the Department.[5]

Although the Act's language contains no restrictions on the types of corporate frauds that trigger protection under the whistleblower provision, the Department in this case created the *Platone* rule

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[4] *See* Deborah Solomon, *For Financial Whistle-Blowers, New Shield is an Imperfect One*, WALL ST. J., May 19, 2005, at A1. *See also The Whistle-Blower's Unending Story*, USA TODAY, April 26, 2008. (Noting that of 1,091 cases decided by administrative law judges, only 17 rulings were for claimants).

[5] *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007). *See also* Beverley H. Earle and Gerald A. Madek, *The Mirage of Whistleblower Protection under Sarbanes-Oxley: A Proposal for Change*, 44 AM. BUS. L. J. 1 (2007).

to exclude from protection those employees who report fraudulent conduct directed against third parties and not corporate shareholders. In this case, the Department determined that the direct victims of the fraudulent conduct were members of the pilot's union, not the airline itself. Accordingly, the Department determined that the economic consequences of the fraud did not constitute a "fraud against shareholders," and ruled that the reporting of the conduct was not protected.

B. Proceedings Below

Platone filed this action with an initial complaint to the U.S. Occupational Safety and Health Administration (OSHA). After OSHA rejected her claim, Platone sought and obtained a hearing before an administrative law judge. After hearing evidence over four days, the ALJ issued a recommended decision and order on April 30, 2004, that contained detailed factual findings supporting Platone's claim.

Seven days after Stacy Platone met with her employer's senior personnel officer and described a fraudulent scheme to funnel improper payments to union leaders, she was discharged by ACAI. During that meeting, Platone explained how pilots were "stealing" from the company and how her immediate supervisor – the company's chief labor official – had blocked her from stopping the improper payments. Platone described a classic fraud scheme, explaining to her company how senior members of the airline's

pilots union were manipulating the system to obtain pay for days they did not fly and how her supervisor undermined her efforts to end the scheme.

In the proceedings before the administrative law judge and in its corporate reports, ACAI openly conceded that it needed contract concessions from its unions in order to survive. Platone's investigation demonstrated that the airline was willing to funnel secret payments to union leaders in an apparent effort to obtain those concessions. Over the course of several months, Platone discovered how certain pilots were manipulating a process known as the flight-loss system, under which pilots received their usual flight pay when they were instead doing work for the union. The end result, Platone determined, was costly for the airline, which paid both the pilot who was supposed to be flying, as well as the reserve pilot called in to actually fly the trips.

At first, Platone believed she had uncovered a pilots-only scheme, but when her supervisor rebuffed her efforts to end the scheme, "struck a nerve." The ALJ, in her recommended decision, found that Platone had indeed struck a nerve,[6] and immediately after Platone moved to stop the fraudulent payments, the pilots union broke off negotiations with the airline on the subject of concessions.

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[6] "I find that Ms. Platone's sense she had struck a nerve was eminently reasonable, and that she had a rational and reasonable basis for her belief that Mr. Rodgers, and perhaps others at ACA, were complicit in a scheme to compensate pilots improperly, in hopes of gaining contract concessions." Recommended Decision and Order, App., *infra* 99a.

The administrative law judge determined that Platone had uncovered an ongoing fraud against the airline. In reversing, the ARB acknowledged it was likely that a fraud was in fact occurring, but it reversed the ALJ reasoning that the airline was committing fraud against the union and not against shareholders. That was so, the ARB reasoned, because the union was ultimately responsible for reimbursing the airline for the payments to pilots working on union business.[7]

In her findings of fact, the ALJ said Platone:

> "suspected that the [airline] management was attempting to improperly channel money to senior members of ALPA [the pilots' union], indeed represent ALPA in upcoming contract negotiations, in order to convince the union officials to make contract concessions that would favorably affect [the airline's] bottom line.
>
> "Viewing the evidence as a whole and factoring in my determinations on the credibility of various witnesses at the hearing, I find that the complainant's suspicions were reasonable, and that she had good grounds to believe that a fraud was being perpetrated on the airline as well as ACAI's shareholders."[8]

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[7] There was no evidence presented during the four-day hearing before the administrative law judge that the pilots union ever reimbursed the airline for the fraudulent payments.

[8] App., *infra* 94a.

In the interim, ACAI's successor, FLYi, Inc., filed for bankruptcy protection, and the airline obtained an order from the bankruptcy court granting relief from the automatic stay to allow the Department's Administrative Review Board (ARB) to issue a final decision. In its ruling, the ARB determined that Platone "did not provide [the airline] any information about fraud against shareholders. While she expressed her belief that the pilots were cheating the company out of money, the real victim of any alleged impropriety was ALPA."[9]

The ARB reached this conclusion, it said, based on its determination that the chief union official, arguably the hub of the conspiracy, had given Platone and her immediate supervisor "assurances" that any improper payments to pilots would ultimately be returned to the airline.[10]

After obtaining another order from the bankruptcy court granting relief from the stay, Platone sought review of the ARB's decision by the Fourth Circuit. The appeals court affirmed the ARB,

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[9] App., *infra* 42a-43a.

[10] In truth, the record reflected no such "assurances" made to Platone. The record contained an e-mail from Platone to her immediate supervisor pointing out the union leader's refusal to give her such an assurance. In addition, the ARB could only have reached this conclusion – which was directly inconsistent with the ALJ's factual findings – by crediting testimony from the lone witness (Platone's supervisor) whose testimony the ALJ found not to be credible.

but on alternate grounds.[11] The Fourth Circuit characterized Platone's report to the airline to be limited to a "billing discrepancy," and concluded that "a billing discrepancy, without more, does not constitute fraud, and Platone failed to identify to [the airline] why she believed the actions related to discrepancies would violate securities laws and constitute a fraud."[12]

That phrase from the Fourth Circuit opinion, "violate securities laws and constitute a fraud," shows how the panel viewed the scope of Sarbanes-Oxley protection, a view consistent with that of the Department.

It is plain from the Fourth Circuit's holding that the panel impliedly adopted the Department's

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[11] Platone sought a rehearing based on the panel's apparent violation of the *Chenery* doctrine, which forbids reviewing courts to uphold administrative decisions on grounds other than those stated by the agency. The Fourth Circuit denied Platone's petition for rehearing. *See SEC v. Chenery Corp.*, 318 U.S. 80, 95, 63 S.Ct. 454, 87 L.Ed. 626 (1943).

[12] 548 F.3d at 327. (App., *infra* 9a). The panel attributed this conclusion to the ALJ and the ARB, but again, the record offers no support for this conclusion. The ARB's decision referred to "billing discrepancies" only in the context of Platone's initial investigation, before she realized her supervisor was part of the scheme. The ALJ found that Platone set out all of the essential elements of mail and wire fraud in her meeting with her employer's chief personnel officer. Further, the ALJ observed that the company's notes of that meeting – which were not produced until the personnel officer had completed her direct testimony – supported Platone's recollection of the meeting. In any event, it was the union's improper billing for flight-loss pay that formed the basis for Platone's reporting of an ongoing fraud.

Platone rule – that the statute protects the reporting only of frauds against shareholders. Although the Fourth Circuit said its ruling did not reach the ultimate issue of whether a suspected mail or wire fraud must be adverse to shareholders, the language above clearly denotes that the panel accepted the Department's narrow view of the statute.

REASONS FOR GRANTING THE PETITION

The Court should grant the review to resolve the fundamental question of whether employees of publicly traded companies risk retaliation and firing for reporting their reasonable beliefs that their employers are engaging in fraud. A definitive answer to this question will directly impact the conduct of corporate officials as well as the outcome of untold pending and future whistleblower claims before the Department and various federal courts.

Congress created the Act's whistleblower provision in the aftermath of various corporate scandals, and the underlying legislative policy is arguably more poignant now as the motivation for such corporate misconduct can only increase as companies struggle during an economic downturn.

The fraudulent corporate conduct in this case grew out of desperate economic conditions in the airline industry that started just after the attacks of September 11. Sadly, the Congressional concerns about such fraudulent conduct, as well as the plain wording of the statute, have not provided protection to employees reporting certain frauds.

Plainly, the ARB's "interpretation" of the whistleblower provision is in fact a substantially

limiting amendment. By excluding the types of mail and wire frauds covered by the provision to those frauds "against shareholders," the Department has effectively deleted the enumerated frauds, such as mail and wire fraud, from the Act. Put another way, it is difficult to conceive of corporate conduct that would constitute a fraud against shareholders without running afoul of federal securities laws, which comprise the remaining enumerated crimes under the statute.

The *Platone* rule excludes essentially any fraud scheme against an entity outside the corporation itself. The reporting of acts for which corporate officials could spend years in prison, as well as acts that could result in staggering fines for the corporation, are excluded from the *Platone* rule's scope of protected activity.

A. THE DEPARTMENT'S *PLATONE* RULE IMPROPERLY DENIES PROTECTION TO CORPORATE WHISTLEBLOWERS

Citing only the statute's broadly worded preamble as authority, the Department in this case summarily excluded the reporting of essentially all mail and wire frauds from its definition of protected activity under the Sarbanes-Oxley Act.[13] That ruling

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[13] The ARB found the limitation on protected activity in the Act's preamble: "To **protect investors** by improving accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). (Emphasis in ARB decision). *See* App., *infra* 33a.

is now binding upon all investigators of the Occupational Safety and Health Administration, who make initial determinations of complaints, as well as all of the Department's administrative law judges.

Without stating any limitation, the Act enumerates four specific fraud offenses, as well as "any rule or regulation of the Securities and Exchange Commission" and "any provision of Federal law relating to fraud against shareholders. Those four specific fraud provisions, along with the more general references to securities laws, define the scope of protected activity under the Sarbanes-Oxley Act.

However, some several lower courts, including the Fourth Circuit,[14] have concluded that the Department's interpretation of the statute is entitled to *Chevron*[15] deference, although it is important to note that the Fourth Circuit did not observe any ambiguity in the language of the Act's provision enumerating mail, wire and bank frauds.

This corporate whistleblower cause of action is seven years old, and the Department has reported that already there have been more than 1,000 complaints filed by employees seeking whistleblower protection.[16] It is not possible to determine how

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[14] *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008), *Platone v. U.S. Department of Labor*, 548 F.3d 322, 326 (4th Cir. 2009).

[15] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984).

[16] *See* USA TODAY article cited *supra* note 1. The Department's most recent statistics, provided pursuant to Petitioner's

many of those 1,000-plus complainants sought protection for reporting a suspected mail- or wire-fraud scheme. However, it is evident that a substantial number of dismissals at the ALJ level have been based on a determination that the employee had not engaged in protected activity under the Act.

The Department's decision in this case was widely heralded as a breakthrough victory for corporate defendants in Sarbanes-Oxley claims. The decision attracted wide attention in the legal community and appeared countless times in litigation summaries, law firm blogs and corporate bulletins.[17]

By affirming the Department's decision, the Fourth Circuit let stand the severely narrowed definition of protected activity, essentially deleting mail, wire and bank fraud from the list Congress set forth in the statute. Only those claimants who have opted out of the administrative adjudicatory scheme

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request, show 1,442 complaints filed since 2002, with 30 having been found meritorious.

[17] *See* e.g., Lisa Stephanian Burton, Steven F. Cherry, Thomas W. White, Carrie Wofford, *Whistleblower Complaints Limited to Fraud Against Shareholders*, www.wilmerhale/publications/whPubsDetail.aspx?publication=3464. *See also*, *One Minute Memo: DOL Confirms SOX Inapplicable to Most Employee Complaints*, www.seyfarth.com/dir.docs/news_item/788623fd-ad95-4d84-b46b-be8a6649c618_documentupload.pdf

and filed new cases in federal courts have had any chance of winning protection.

B. LOWER COURTS HAVE REACHED CONFLICTING DECISIONS ON WHETHER THE PERCEIVED CONDUCT MUST BE A FRAUD AGAINST SHAREHOLDERS

The split among lower courts on this issue is remarkably devoid of any analysis of a perceived ambiguity in the statutory language. Rather, those courts that have rejected the *Platone* rule have done so based on the plain wording of the Act. Typically, the courts that have applied the "shareholder fraud" standard have done so apparently assuming that the term is in the Act. And, of course, it is not.

In *Day v. Staples, Inc.*,[18] the First Circuit decided that the reporting of a practice defrauding customers was not "shareholder fraud" and thus not protected by the Act.

"One practice was said to benefit Staples to the detriment of its customers – that the [company] was 'knowingly refusing to provide its customers with monetary credit they were entitled to,' thus giving Staples an 'unfair benefit.' This is not even plausibly a situation of shareholder fraud," the First Circuit said.[19]

"Day may have made a complaint related to consumer protection, but he does not have an

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[18] 555 F.3d 42 (1st Cir. 2009).

[19] 555 F.3d 42, 56 (Citing the Fourth Circuit's decision in *Platone*).

objectively reasonable belief there was shareholder fraud under § 1514A," the First Circuit said.[20]

The term "shareholder fraud" misstates and mischaracterizes the plain language of the statute. As used in *Day* and elsewhere, courts have employed the term "shareholder fraud" as shorthand for the *Platone* rule to exclude frauds against extra-corporate entities.

Without stating any limitation, the Act enumerates four specific fraud offenses, as well as "any rule or regulation of the Securities and Exchange Commission" and "any provision of Federal law relating to fraud against shareholders."[21] Those four specific fraud provisions, along with the more general references to securities laws, define the scope of protected activity under the Sarbanes-Oxley Act.

In *Harp v. Charter Communications*, 558 F.3d 722 (7th Cir. 2009), the Seventh Circuit observed that it was prepared to apply the *Platone* rule to the enumerate fraud sections in the Act. While the precise issue in this case was not central to the Seventh Circuit's ruling in *Harp*, the seventh Circuit said that reporting of fraud on a municipal government would not trigger Sarbanes-Oxley protection. The court of appeals said, "Harp

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[20] 555 F.3d 42, 57.

[21] In *Platone*, the Department used some variation of this language (fraud against shareholders) throughout its decision, apparently believing, but not ruling, that the final clause of the whistleblower section somehow modified the entire whistleblower provision.

acknowledges that she was unaware of any of that history at the time of the incidents at issue here, and in any event those facts point to fraud on the City, not the shareholders, and that was not the fraud reported within the company nor is it the basis for the Sarbanes-Oxley challenge."[22]

Similarly, a district court in *Van Asdale v. Int'l Game Technology,* 498 F.Supp.2d 1321 (D. Nev. 2007), determined that the reporting of a fraud on the United States Patent Office did not trigger Sarbanes-Oxley protection. The court said: "the potential for fraud reported was the potential for fraud on the patent office, not fraud on the shareholders."[23]

The Fourth Circuit, in a case involving allegations of fraud on the United States Food and Drug Administration, observed: "There is no suggestion . . . that Wyeth or its employees had or even intended to mislead *shareholders*, as necessary to support a reasonable belief that the securities laws had been or were being violated. *Livingston v. Wyeth, Inc.*, 530 F.3d 344, 354 (4th Cir. 2008) (Emphasis in decision).

Other courts have had no trouble finding that that the plain language of the Act provides protection to employees who report reasonable suspicions of corporate fraud, regardless of whether the victim is the corporation, the shareholders or another entity.

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[22] 558 F.3d at 726.

[23] 498 F.Supp.2d at 1331.

In *Reyna v. Conagra Foods, Inc.*, 506 F.Supp.2d 1363 (M.D.Ga. 2007), a district court rejected a defendant's attempt to dismiss a Sarbanes-Oxley whistleblower claim based on a reported scheme to defraud the company's insurance carrier. The court said, "The statute clearly protects an employee against retaliation based on that employee's reporting of mail fraud or wire fraud regardless of whether that fraud involves a shareholder of the company."[24]

In *O'Mahony v. Accenture Ltd.*, 537 F.Supp.2d 596 (S.D.N.Y. 2008), a district court likewise determined that the Act's definition of protected activity extends to a corporate scheme to evade taxes.

"Defendants argue that the protection of § 1514A applies only to an employee's reporting of 'fraud against shareholders.' Defendants assert that, since O'Mahony's complaints regarding Defendants' alleged violations of §§ 1341 and 1343 do not include any allegation of fraud against 'shareholders,' she is not protected by the statute. The Court disagrees."[25]

At some length, the *O'Mahony* court explained that, while the statutory language is plain, the interpretation urged upon it by the Defendant corporation was inconsistent with the doctrine of the last antecedent enunciated by this Court in *Barnhart v. Thomas*.[26] Said Judge Marrero: "Here,

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[24] 506 F.Supp.2d at 1382.

[25] 537 F.Supp.2d at 516.

[26] 540 U.S. 20, 26, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003).

Defendants offer no evidence that Congress intended the phrase 'relating to fraud against shareholders' to limit all the preceding phrases. (omitting citations). Nor does it lead to an unreasonable result to hold that an employee who alleges fraud under any of the enumerated statutes is protected under § 1514A."[27]

C. THE "SHAREHOLDER FRAUD" ISSUE THAT HAS DIVIDED THE LOWER COURTS IS RECURRING AND EXCEPTIONALLY IMPORTANT

With some irony, the Department in this case based its "interpretation" of the Sarbanes-Oxley whistleblower provision on the Act's preamble language relating to the protection of investors. As Platone argued before the Fourth Circuit, it is virtually inconceivable that any corporate scheme to violate the mail- and wire-fraud statutes would not – ultimately – be detrimental to the corporation's shareholders.

It is evident that Congress believed whistleblower protection was a necessary check in an atmosphere of widespread ethical misconduct by corporate leaders. Indeed, reporting of fraudulent conduct by corporate insiders is one of the few checks available in a system where the financial repercussions of corporate fraud can have profound and lasting effects.

In a case involving a municipal whistleblower, Judge Wilkinson of the Fourth Circuit recently

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[27] 537 F.Supp.2d at 517.

observed that it is crucial, now more than ever, to protect employees who have the courage to expose wrongful conduct. The case involved a senior Baltimore police officer who challenged the police department's retaliating against him for releasing a internal investigation of a shooting incident to the Baltimore Sun. Judge Wilkinson wrote eloquently of the societal need to protect such reporting during times of great change in American journalism.[28]

Said Judge Wilkinson: "It is well known that the advent of the Internet and the economic downturn have caused traditional news organizations throughout the country to lose circulation and advertising revenue to an unforeseen extent. As a result, the staffs and bureaus of newsgathering organizations – newspapers and television stations alike – have been shuttered or shrunk . . . The in-depth investigative report, so essential to exposure of public malfeasance, may seem a luxury even in the best of economic times . . . [a]nd in these most difficult of times, not only investigative coverage, but substantive reports on matters of critical public policy are increasingly shortchanged."

Traditionally and historically, historians and business academicians have extolled the role of whistleblowers and have pointed to their value as a vital check against greed, unethical conduct and criminal behavior.[29] Now, with economic pressures

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[28] *Andrew v. Clark*, 561 F.3d 261, 271 (4th Cir. 2009) (Wilkinson, J., concurring).

[29] See generally MARCIA P. MICELI, JANET P. NEAR, BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES (1992), TERANCE D. MIETHE,

reducing the ranks of investigative reporters, not to mention investigators of various governmental regulatory agencies, the role of corporate insiders who are willing to risk their professional standing to report fraud is all the more critical.

Judge Wilkinson's remarkable concurrence echoes concerns that have only grown since the events that led Congress to enact the Sarbanes-Oxley Act. Only a decision of this Court can give the necessary guidance for courts and administrative decision makers as they assess the merits of whistleblower claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 13, 2009

WHISTLEBLOWING AT WORK: TOUGH CHOICES IN EXPOSING FRAUD, WASTE AND ABUSE ON THE JOB (1999).

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

BEFORE THE HONORABLE JUDGE WILLIAMS,
JUDGE TRAXLER AND JUDGE GREGORY

Stacy PLATONE v. UNITED STATES
DEPARTMENT OF LABOR, Respondent.
Equal Employment Advisory Council; Chamber of
Commerce of the United States of America, Amici
Supporting Respondent.

Case No.: 07-1635.

ARGUED: September 22, 2008
ISSUED: December 3, 2008

OPINION

This case challenges a ruling of the Department

of Labor's Administrative Review Board ("ARB") denying Stacy Platone whistleblower protection under the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2006). For the reasons stated herein, the ARB's decision is affirmed.

I.

Stacy Platone, Appellant, worked for the Airline Pilots Association ("ALPA") as a pilot communications specialist. In the summer of 2002, Atlantic Coast Airlines ("ACA"), a wholly owned subsidiary of Atlantic Coast Airline Holdings, Inc., solicited applications for the position of manager of labor relations. Upon the recommendation of Captain John Swigart, a pilot at ACA and chair of ALPA's local Master Executive Council, ACA hired Platone to fill the position. Swigart and Platone were in a relationship at the time; however, it is disputed whether Jeffrey Rodgers, ACA's Senior Director of Labor Relations and Planning-and Platone's immediate supervisor-knew of the relationship at the time of hiring.

After she started working at ACA, Platone began to notice discrepancies regarding the airline's flight-loss process-the procedure by which the union reimbursed the airline when its pilots had to miss flights in order to attend union meetings. Tiffany de Ris, ACA's Manager of Crew Resources, informed Platone that ALPA had not been billed for several months of flight loss.

Platone obtained the flight-loss records in

February 2003 and discovered that pilots were also intentionally scheduling flights for days on which they were originally not scheduled to fly and for times at which they knew they would be required to attend union meetings. In essence, the pilots were getting paid for days on which they were originally not even supposed to fly and, in fact, did not fly. ALPA's policy was not to pay for missed time on originally scheduled days off. When Platone alerted Rodgers to the issue, he told her that ACA would not pay the pilots for the days off if ALPA would not reimburse ACA. Platone had also informed Captain Chris Thomas, an ACA pilot and Swigart's successor at ALPA, of the discrepancy, and Thomas contacted Rodgers and assured him that the union would reimburse ACA for the flight loss.

Platone was not satisfied with the union's response, and on March 6, 2003, she sent Rodgers a draft letter, addressed to Thomas, demanding that ALPA uphold its flight-loss obligations. The letter also informed Thomas that if ALPA wanted ACA to continue to pay pilots who attended ALPA business on days for which they were not originally scheduled to fly, but which were subsequently voluntarily scheduled, he would need to inform ACA in writing to do so and indicate that ALPA would reimburse ACA. The following day, Rodgers e-mailed Platone to inform her that he did not intend to send the letter that she drafted.

Platone met with Michelle Bauman, ACA's Director of Employment Services, on March 12, 2003. Bauman testified that Platone mentioned the flight-loss problem during the meeting, and

handwritten notes from Bauman's assistant verified that there was a discussion of the issue, though there was no indication that Platone made allegations of fraud. The following day, Platone met with senior airline officials, who suspended her with pay due to an unspecified conflict of interest. On March 19, 2003, Platone was officially fired, ostensibly because of her relationship with Captain Swigart.

Platone filed a Sarbanes-Oxley whistleblower action with the Occupational Safety and Health Administration ("OSHA") on April 3, 2003, setting forth the above facts, and for the first time, making an allegation of fraud. OSHA denied Platone's complaint, finding that she failed to establish that she had engaged in protected activity. On August 14, 2003, Platone requested a hearing before the Office of Administrative Law Judges.

The administrative law judge ("ALJ") found that Platone's suspicions of fraud set forth in her OSHA complaint were reasonable, and that by alerting Rodgers and Bauman to the discrepancies, she had engaged in protected activity under the Sarbanes-Oxley Act. The ALJ concluded that a fraudulent scheme to compensate pilots in the hopes of gaining union contract concessions would necessarily involve the use of the mail and wires, and would therefore fall under the protection of the Sarbanes-Oxley Act. The ALJ imputed knowledge of Platone's complaints to the managers at ACA responsible for employment decisions, whether or not they were directly involved in the dealings. The ALJ further concluded that Platone's complaints were a contributing factor to

her dismissal.

Given that Platone's job involved direct dealings with ALPA, the ALJ found that ACA had a legitimate, nonpretextual reason for firing Platone. Nevertheless, the ALJ concluded that it was impossible to separate the legitimate and improper reasons for firing Platone, and therefore that ACA failed to meet its burden to show by clear and convincing evidence that it would have fired Platone even if she had not come forward with her complaints.

ACA filed an appeal with the Administrative Review Board of the Department of Labor ("ARB"), which reversed the ALJ's findings. First, the ARB held that allegations of mail or wire fraud under Sarbanes-Oxley must involve conduct that is at least "adverse to investors' interests." *Platone v. FLYi, Inc.*, ARB Case No. 04-154, 2006 DOLSOX LEXIS 105 at *29 (ARB Sept. 29, 2006). Second, the ARB held that Platone's allegations must relate definitively and specifically to the categories of fraud or securities violations listed in 18 U.S.C. § 1514A(a)(1) (2006). *Id.* at *33.

The ARB concluded that Platone's e-mails to Rodgers and meeting with Bauman did not communicate information specifically enough to indicate possible fraud against shareholders. Indeed, the ARB concluded that "the real victim of any alleged impropriety was ALPA" since Platone and Rodgers had been reassured that ALPA would reimburse ACA for the flight pay loss. *Id.* at *42-43. Having reached this conclusion, the ARB held that

Platone failed to provide ACA with specific information relating to protected activity under § 1514A(a)(1), and it therefore declined to address the remaining issues raised on appeal. *Id.* at *45-46.

II.

The whistleblower provision of the Sarbanes-Oxley Act is codified at 18 U.S.C. § 1514A(a) (2006).[1]

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[1] (a) Whistleblower Protection for Employees of Publicly Traded Companies.-No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78 *l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78 *o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee-

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

The Act incorporates the rules and procedures set forth in 49 U.S.C. § 42121(b) (2000). Because the allegations at issue occurred in Virginia, jurisdiction***326*** is conferred on this Court by 49 U.S.C. § 42121(b)(4).[2]

The Administrative Procedure Act, 5 U.S.C. § 706(2) (2006), sets forth the standard of review for this action, as referenced in 49 U.S.C. § 42121(b)(4)(A). The ARB's findings of law are reviewed de novo, with due deference accorded by this Court to the ARB's interpretation of § 1514A, and the findings should be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2000). *See also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Welch v. Chao*, 536 F.3d 269, 275-76 (4th Cir.2008).

[1] The Administrative Procedure Act compels this Court to uphold the ARB's findings of fact if they are supported by substantial evidence. In doing so, however, we also accord a degree of deference to the factual findings of the ALJ. The ARB's standard for reviewing the factual findings of the ALJ is substantial evidence. 5 U.S.C. § 706(2)(E). Substantial evidence is that which is "such relevant

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[2] "Any person adversely affected or aggrieved by [a final order of the Secretary of Labor] may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation."

evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938).

III.

The ARB ruled below that allegations to management under the whistleblowing provision of the Sarbanes-Oxley Act must be definitively and specifically related to one of the areas accorded protection in § 1514A(a)(1). The Court upheld this conclusion in *Welch*, 536 F.3d 269, 276 n. 2, where it accorded *Chevron* deference to the ARB's interpretation of § 1514A.[3]

[2] Factually, the ALJ found that at least Rodgers, Bauman, and Davis were made aware of the flight-loss issue by Platone, and it imputed knowledge to Moore, the final decision-maker. Moreover, the ALJ concluded that the scheme alleged in the OSHA complaint inherently involved the use of mail and wires-an area protected by the statute. As noted above, however, the ARB refined the requirements for § 1514A and determined that Platone failed to provide her superiors with definitive and specific information regarding the alleged fraud that was taking place. The ARB reached its conclusion by reading Platone's actions

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[3] The ARB went further to interpret § 1514A to require the complainant, when alleging mail or wire fraud, to demonstrate that the fraud would be adverse to the interests of shareholders or investors. The *Welch* decision did not reach this portion of the ARB's opinion, and because we decide this case on alternate grounds, neither does our decision today.

as little more than alerting ACA management to an internal billing issue. We agree with the ARB and find that Platone failed to make a proper allegation of fraud.

As the ALJ noted, ACA was engaged in important contract negotiations with ALPA at the time of Platone's complaints. Platone alleged in her OSHA complaint that by avoiding the flight-loss issue, ACA was trying to channel money to the ALPA officials who would be involved in these negotiations in the hope that ACA would obtain favorable concessions. Thus, the ALJ concluded that Platone had a reasonable basis to suspect that ACA officials were engaging in fraud against the shareholders.

But the ALJ did not find that Platone clearly articulated her belief of mail or wire fraud to ACA, and the ARB found that she clearly did not. It is true that she alerted ACA management to a billing discrepancy. Yet, a billing discrepancy, without more, does not equal fraud, and Platone failed to identify to ACA why she believed the actions related to the discrepancies would violate securities laws and constitute a fraud. The first time Platone made an actual allegation of fraud was in her OSHA complaint. Therefore, Platone did not sufficiently articulate her fraud theory to ACA, and Sarbanes-Oxley does not afford her whistleblower protection.

Our holding today does not heighten the requirements for a complainant's prima facie showing or otherwise change the burden-shifting regime for Sarbanes-Oxley whistleblower actions.

See 49 U.S.C. § 42121(b)(2)(B) (2000). We hold only that a complainant must alert management to more than the fact that the company's near-term profits were affected by billing discrepancies in order to meet the standard of definitively and specifically alleging mail or wire fraud.

IV.

As a result of our conclusion that Platone failed to establish a prima facie case for Sarbanes-Oxley whistleblower protection, we need not address the remaining issue of whether ACA presented a legitimate, non-pretextual reason for firing Platone.

The decision of the ARB is hereby affirmed.

AFFIRMED

APPENDIX B

THE ADMINISTRATIVE REVIEW BOARD OF THE DEPARTMENT OF LABOR DECISION AND ORDER

BEFORE THE ADMINISTRATIVE REVIEW BOARD OF THE DEPARTMENT OF LABOR

IN THE MATTER OF STACY M. PLATONE AND FLYI, INC.[1]

CASE NO. 04-154
ALJ CASE NO. 2003-SOX-27

ORDER ISSUED: SEPTEMBER 29, 2006

Before WAYNE C. BEYER, Administrative Appeals Judge, M. CYNTHIA DOUGLASS, Chief Administrative Appeals Judge

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[1] When the complaint was filed the Respondent operated under the name Atlantic Coast Airlines Holdings, Inc. On September 9, 2004, the Respondent requested that the case caption be amended to reflect its new identity, FLYi, Inc. The Respondent's motion is unopposed and therefore, we amend the caption accordingly. However, to avoid confusion and maintain consistency with the prior decisions, the text of the Administrative Review Board's decision will refer to the parties as originally identified in the complaint and the decisions below.

FINAL DECISION AND ORDER

On April 2, 2003, Stacy M. Platone filed a complaint with the United States. Department of Labor under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX or Act).[2] She alleged that Atlantic Coast Airlines Holdings, Inc. (ACA Holdings) violated the employee protection provision of the Act when it suspended her and later terminated her employment effective March 19, 2003. After a hearing, an Administrative Law Judge (ALJ) issued an April 30, 2004 recommended decision finding that Platone had engaged in protected activity and her suspension and termination were causally related to the protected activity. In a supplemental decision dated July 13, 2004, the ALJ recommended awarding Platone damages, costs and attorney fees. ACA Holdings timely appealed the ALJ's decisions. Because the ALJ erred as a matter of law in finding that Platone had engaged in protected activity, we decline to adopt the April 30 and July 13, 2004 recommended decisions and deny Platone's complaint.

BACKGROUND

We have carefully reviewed the record and find that it generally supports the ALJ's recitation of the facts.[3] Therefore, we will summarize the relevant facts of the case. ACA Holdings was a publicly-

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[2] Pub L. No. 107-204, 116 Stat. 745, 802-04 (2002), 18 U.S.C.A. § 1514A (West Supp. 2005). The regulations implementing Section 806 are found at 29 C.F.R. Part 1980. (2006).

[3] Recommended Decision and Order, April 30, 2004 (R. D. & O.) at 2-18.

traded holding company Pub L. No. 107-204, 116 Stat. 745, 802-04 (2002), 18 U.S.C.A. § 1514A (West Supp. 2005). The regulations implementing Section 806 are found at 29 C.F.R. Part 1980. (2006) incorporated in the state of Delaware.[4] Atlantic Coast Airlines (ACA) was a wholly-owned subsidiary of ACAHoldings and its principal operating business.[5] During the relevant time frame, ACA operated as a regional passenger carrier serving portions of the United States and Canada under marketing agreements with United Airlines, Inc. (d/b/a United Express) and Delta Air Lines, Inc. (d/b/a Delta Connection).[6] Based on ACA Holdings' 2002 annual report (SEC Form 10-K), the company derived "substantially all" of its revenues through its annual report also indicated that the company had approached the pilots' union with the intent to negotiate wage reductions and work rule changes

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[4] Complainant's Exhibit (CX)-1 at 2. ACA Holdings/FLYi, Inc. common stock was previously listed on the NASDAQ stock market. CX-12. FLYi, Inc. filed for Chapter 11 bankruptcy protection on November 7, 2005, and suspended all flight operations effective January 5, 2006. On March 24, 2006, the parties submitted a Notice of Modification of Automatic Stay stating that the United States Bankruptcy Court for the District of Delaware had entered an order granting the motion of FLYi, Inc. and its affiliated debtors to modify the automatic bankruptcy stay to permit the Administrative Review Board to issue its decision in this proceeding. *See* Order Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure Approving the Stipulation between the Debtors and Stacey M. Platone to Modify the Automatic Stay, Case No. 05-20011 (MFW) (Bankr. Del. Mar. 16, 2006).

[5] CX-1 at 5. ACA was later renamed Independence Air, Inc.

[6] *Id.*

through voluntary concessions, with the goal of marketing agreements with United and Delta.[7] The bringing its pilot costs in line with other competing regional carriers.[8]

In the summer of 2002, Jeffrey F. Rodgers, ACA's Senior Director of Labor Relations and Planning, sought candidates for the position of manager of labor relations.[9] Captain John Swigart, an ACA pilot and high-ranking union representative,[10] recommended Platone for the position.[11] At the time, Platone was an Air Line Pilots Association (ALPA) January 2001, and the two were romantically

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[7] *Id.* at 5. Revenue derived from the marketing agreement with United represented 82 percent of ACA's total revenue for the year ending December 31, 2002. *Id.* United and its parent company, UAL Corporation, filed for Chapter 11 bankruptcy protection on December 9, 2002, and United's financial difficulties ultimately affected ACA's operations. *Id.* at 4, 6.

[8] *Id.* at 11. The existing collective bargaining agreement (CBA) with the pilots' union was ratified on February 9, 2001, and covered a four and a half year period through August 8, 2005. *Id.*; CX-38 (CBA, Section 28 ¶ C) at 160-161. In June 2003, the pilots' union and ACA agreed to a revised conditional contract that included, among other things, reductions in pay rates. CX-12; CX-39.

[9] Hearing Transcript (TR) at 419, 422.

[10] The Air Line Pilots Association (ALPA) represented ACA's pilots. CX 1 at 11. Swigart was then-chairman of ALPA's ACO Master Executive Council (MEC), a position he had held since March 1999. His term as MEC chairman was scheduled to expire at the end of October 2002. TR at 75.

[11] TR at 430.

involved when he recommended her for the ACA employee.[12] Swigart had known Platone since position, a fact Swigart did not personally disclose to Rodgers until several months later.[13]

In July 2002, Platone participated in a series of interviews with various ACA managers, including Rodgers.[14] Several interviewers expressed concern about Platone's ability to represent ACA's interests given her association with ALPA.[15] However, Platone was able to assuage those concerns, and ACA ultimately offered her the position of labor relations manager.[16] During the interview process with ACA, Platone did not disclose the full extent of her personal relationship with Swigart.[17] Platone assumed her new duties on August 19, 2002.[18]

One of Platone's responsibilities as labor relations manager was processing ALPA pilot-representative's requests for removal from flight service. Under the collective bargaining agreement (CBA) between ACA

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[12] *Id.* at 70-72, 430. Platone had worked as an ALPA communications specialist since April 1998. Respondent's Exhibit (RX)-16 at 4.

[13] TR at 144, 150, 170, 325, 442, 547.

[14] *Id.* at 197, 422.

[15] *Id.* at 431-433, 615-616.

[16] *Id.* at 433; RX-15.

[17] TR at 190, 323-324, 617.

[18] *Id.* at 190.

and ALPA, a pilot who was needed to perform ALPA-related business would request that he or she be removed from ACA's scheduled flight service. Depending on the needs of the airlines, ACA might agree to release the pilot and if it did, ACA nonetheless paid the pilot for the hours he or she would have otherwise worked. ACA also incured the cost of paying a substitute pilot to perform the services the ALPA pilot-representative would have performed. As a means of compensating ACA for the additional costs incurred (flight pay loss), ALPA agreed to reimburse ACA on a monthly basis for its payroll expenditures related to ALPA pilot-representatives removed from service (RFS).[19] The authorization, scheduling, tracking and billing procedures related to flight pay loss were divided among several ACA departments, including labor relations.[20]

In September 2002, Tiffany de Ris, ACA manager of crew resources administration, advised Platone that there were some billing discrepancies concerning flight pay loss.[21] At the time, de Ris' department was responsible for billing ALPA[22] She

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[19] CX-38 (CBA, Section 25 ¶ J) at 140-143. According to the terms of the CBA, ACA billed ALPA 120 percent of the individual pilot-representative's hourly rate so as to recoup the additional expenses incurred for various employee fringe benefits. *Id.* at 141.

[20] TR at 712-713

[21] *Id.* at 715

[22] Although the CBA called for monthly billing, de Ris testified that ACA had been billing ALPA on a quarterly basis based on a verbal agreement. TR at 715. When de Ris met with Platone

reported that the hours ACA billed were not necessarily the hours ALPA had on record.[23] Uncertain about how to proceed, de Ris brought the matter to Platone's attention because of her working relationship with ALPA and Platone's familiarity with the CBA.[24] According to de Ris, Platone told her to "hold off" while Platone looked into it.[25] Based on her conversation with Platone, de Ris stopped

billing ALPA for flight pay loss.[26]

Apparently, there was a misunderstanding between de Ris and Platone as to what Platone meant when she told de Ris to "hold off." Whereas de Ris suspended billing in September 2002, Platone did not immediately pick up where de Ris had left off.[27] In early December 2002, Platone learned that ALPA had not been billed since June 2002, and at that time, Platone told de Ris to bill ALPA through October 2002.[28] Platone also requested various flight

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in September 2002, ALPA had not been billed for flight pay loss since June 2002. *Id.* at 720-721.

[23] *Id.* at 715.

[24] *Id.*

[25] *Id.* at 716.

[26] *Id.* at 718-721.

[27] Platone testified that she never told de Ris in September 2002 not to send bills to ALPA. TR at 370-371. Both Rodgers and Platone testified that billing was not originally part of labor relations' responsibility. *Id.* at 215, 278, 450. Platone ultimately assumed responsibility for billing ALPA in March 2003. *Id.* at 759, 761.

[28] TR at 219-220, 269, 270.

pay loss records and she advised de Ris that labor relations would play a more active role in subsequent billing periods.[29] According to Platone, as of February 2003, de Ris' department had yet to bill ALPA for flight pay loss dating back to summer 2002.[30]

During the last week of February 2003, Platone conducted, in her words, a "very, very preliminary investigation," that uncovered four pilot-representatives who she believed had abused the flight pay loss system[31] One of those individuals, Mike Rops, was a member of the
ALPA/ACA scheduling committee[32] By comparing pilot time cards and schedules, Platone believed that pilots had picked up trips on their scheduled days off and later dropped those same trips to attend to union-related business.[33]Platone further explained that at least with respect to scheduling committee participation, the pilot-representatives knew up to six weeks in advance the dates the scheduling

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[29] CX-23;

[30] RX-19 at 13; TR at 274.

[31] TR at 249-250, 264-265.

[32] *Id.* at 249. With respect to Rops, Platone identified five days in January 2003 that she believed were suspect. RX-19 at 13; TR at 274. On those five days Rops was removed from service for a total of 18.75 hours. According to Platone, Rops earned $60.79 an hour. TR at 267; CX-43. Rops' hourly rate ($60.79) multiplied by the number of hours (18.75), plus an additional 20% to cover employee fringe benefits equals $1,367.77 of flight pay loss in January 2003.

[33] RX-19 at 13; TR at 274.

committee planned to meet.[34] Therefore, when they received their flight schedule for the upcoming month, they could pick up assignments on days that were originally scheduled as off days knowing that they were unable to work those flights because of previously scheduled union business.[35]

Platone shared her thoughts about flight pay loss abuse with Rodgers in an e-mail dated March 3, 2003[36] She noted that someone in the pilot union's accounting department had told her that ALPA's policy did not cover reimbursement for dropped trips picked up on originally scheduled days off[37] Rodgers responded that "If National ALPA is not paying the company for pilots on their days off, then [ACA is] not paying the pilots."[38] Rodgers would later testify that this was the first instance he recalled that Platone raised the issue of flight pay loss abuse.[39]

On March 4, 2003, Platone spoke with Captain Christopher Thomas, the new MEC chairman, about the flight pay loss issue.[40] The following day, Thomas sent an e-mail to the MEC and other ALPA

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[34] TR at 250-268.

[35] *Id.* at 250-268

[36] RX-12 at 1-2.

[37] Platone would later identify Kitty Lee as the ALPA accounting department employee she had spoken with concerning ALPA's flight pay loss policy. TR at 280.

[38] CX-28.

[39] TR at 562.

[40] *Id.* at 281-284.

committee members concerning allegations that members may have picked up open flights in anticipation of later dropping those flights for ALPA business.[41] He characterized the alleged practice as "highly unethical" and reminded his members of the need to conduct themselves in a manner that would be above reproach.[42] Thomas forwarded a copy of this e-mail to both Platone and Rodgers.[43] Platone later advised Rodgers via e-mail that Thomas had previously told her that ALPA would pay for trip drops that were picked up on originally scheduled days off.[44] Platone, however, wanted Thomas to provide written assurance, and she felt that Thomas' e-mail
was not consistent with their prior conversation.[45] In reply, Rodgers asked Platone how she was able to determine that the "trade or add of a trip was done with the intent to be paid for ALPA business."[46] She explained that certain trips were picked up or traded after the schedule construction e-mails were sent out.[47]

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[41] RX-3 at 2

[42] *Id.*

[43] *Id*

[44] *Id at 1*

[45] *Id*

[46] *Id.*

[47] *Id.* The scheduling committee e-mail purportedly provided advance notice of the dates when the committee planned to meet. Therefore, the pilot-representatives would have been

On Thursday, March 6, 2003, Rodgers met with Thomas and Rops. Rodgers did not recall the specific details of their conversation, but he did remember that Thomas told him he was "having difficulty working with Stacy."[48] That same day at approximately 6:00 p.m., Platone sent Rodgers, via e-mail, an initial draft of a letter she proposed sending to Thomas under Rodgers' signature.[49] The letter advised, among other things, that absent written notice from ALPA guaranteeing reimbursement, ACA would no longer pay ALPA pilot-representatives for ALPA-related business performed on days that were originally scheduled as off days.[50]

Rodgers responded to Platone's e-mail the following morning, March 7, 2003, indicating that he was "not
interested in sending [the] letter."[51] Rodgers also asked "How far behind [was ALPA] in paying [its]
she asked if he wanted her to "take another stab" at
Rodgers testified that he was unwilling to send the letter because he had already received assurances
the letter.[53] He reportedly told her "Don't bother."[54]

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aware that they had a prior ALPA commitment when they added or traded a trip for those particular dates when the committee was scheduled to meet. TR at 259, 376.

[48] *Id.* at 447, 461-462.

[49] CX-32; RX-4.

[50] CX-33.

[51] CX-32.

[53] TR at 288.

that ALPA would reimburse the company and Thomas had told Rodgers there was no evidence of any wrongdoing.[55] Rodgers also indicated that the letter involved an internal ALPA issue.[56] He asked Platone to focus on the bigger issue – getting the money owed ACA.[57]

Platone also received an e-mail from Thomas on March 7, 2003.[58] He noted that he had spoken with ALPA finance-payroll and one of the union's vice presidents regarding the removal from service issue. He further indicated that he did not think any of their practices was out of line and he asked Platone if she could refer him to the specific ALPA policy. Thomas also noted in his e-mail that he had reiterated ALPA's ethical responsibilities to his committee members.[59]

Platone responded that based on Thomas' e-mail it was her understanding that "ALPA will pay for pilots who pick trips on days dropped later for ALPA business." [60]She explained that as long as she had

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[54] *Id.* at 289.

[55] *Id.* at 456-458, 460-461, 572-574, 576-577.

[56] *Id.* at 460.

[57] *Id.* at 574.

[58] RX-19 at 17.

[59] *Id.*

[60] *Id.*

that understanding from Thomas, she was not worried about billing ALPA for the time. Platone further indicated that she could not provide a specific cite to the ALPA policy she previously mentioned, but it had come into play during her previous experience at ALPA.[61] Thomas responded that according to the letter of agreement, the company covers trips that get dropped for schedule/line construction and he asked that Platone provide the names, date and times regarding any ALPA members who had been less than honest. Thomas also stated that he realized that pilots may have picked up time that was later dropped for schedule construction, but this occurred when ACA had not notified the MEC Chairman of specific dates and times for the work. He again reiterated the union's position on ethical behavior regarding pilot-representatives.[62]. On Saturday, March 8, 2003,

Swigart received a telephone call from MEC Chairman Thomas regarding Platone's employment with ACA.[63] And in an attempt to clarify the matter,

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[61] *Id.*

[62] *Id.*

[63] TR at 140-141

Swigart called Rodgers and during this conversation he revealed that he and Platone were dating.[64] According to Rodgers, this was the first he had heard about Platone and Swigart dating.[65]

When he returned to work on Monday, March 10, 2003, Rodgers spoke with Michelle Bauman, director of employee services, about Platone's romantic relationship with Swigart and other performance issues.[66]Baumann recommended that Rodgers conduct two separate meetings with Platone, the first to discuss performance-related issues and a second meeting to discuss Platone's relationship with Swigart.[67] Rodgers met with Platone that afternoon as recommended.[68] He could not recall what performance-related issues were discussed, but according to Platone they discussed ALPA vacations, ALPA billing and ALPA scheduling committee meeting minutes.

With respect to ALPA billing, Platone recalled that she provided Rodgers a status update, which included various meetings she had with ACA's controller, accounts payable and crew resources bill for June-September 2002 had just recently been sent and that she had directed crew resources to send out

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[64] *Id.* at 143-144, 463. Swigart called Rodgers to inquire about the accuracy of a report he had recently received from Thomas that ACA was investigating Platone. *Id.* at 140-141.

[65] *Id.* at 464.

[66] *Id.* at 467.

[67] *Id.* at 467, 620.

[68] *Id.* at 468.

department.[70] Platone also reported that the ALPA the bill for October 2002 as well.[71] She also reported that her department would handle ALPA billing from November 2002 forward.[72] Platone further indicated that after updating Rodgers about ALPA flight pay loss and billing, he reportedly stated, "Ok, I want my money."[73] Although unable to recall specific details, Rodgers indicated that he was satisfied with the outcome of the March 10, 2003 meeting, noting that Platone provided valid answers.[74]

The following day, March 11, 2003, Rodgers met with Platone to discuss his concerns about her ongoing personal relationship with Swigart.[75] According to Rodgers, Platone indicated that ALPA was out to get her and she felt she was working in a hostile and threatening environment.[76] Because of Platone's complaint of a hostile work environment, Rodgers ended their conversation and immediately called Bauman to investigate Platone's allegation.[77]

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[70] Platone prepared a May 17, 2003 statement for the OSHA investigator wherein she provided a detailed account of her March 10, 2003 meeting with Rodgers. RX-19 at 13.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] TR at 468

[75] *Id*

[76] *Id.* at 469.

Rodgers testified that Platone did not allege any wrongdoing on ACA's part in their meetings on March 10 and 11, 2003.[78]

Bauman and Susan J. Davis, an ACA employee relations specialist, met with Platone on March 12, 2003, to investigate her complaint of a hostile work environment.[79] Platone testified that she told Bauman and Davis about the concerns she had raised with Rodgers about flight pay loss abuse and how the pilot-representatives had cheated the company out of money and now were angry with her for raising the issue.[80] According to Bauman, Platone did not accuse Rodgers of any wrongdoing or express any fear where he was concerned.[81]

On March 13, 2003, ACA suspended Platone with pay pending investigation of a conflict of interest.[82] After further deliberation, ACA terminated Platone's employment effective March 19, 2003, ostensibly because of the conflict of interest that arose from her relationship with Swigart.[83] Both Rodgers and

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[77] *Id.* at 303, 364, 469, 620.

[78] *Id.* at 469-470.

[79] *Id.* at 303-304, 622.

[80] *Id.* at 304, 372. Davis did not testify at the ALJ's hearing. However, her notes from the March 12, 2003 meeting were submitted into the record as CX-53.

[81] TR at 628-629, 668. ACA's investigation of Platone's allegations of a hostile work environment concluded without further action on March 14, 2003. RX 19 at 21.

[82] TR at 473-474, 635; RX-19 at 20.

[83] TR at 474, 635-636.

Bauman testified that Platone's concerns about flight pay loss did not factor in the decision to terminate her employment.[84]

Platone filed a complaint with the Occupational Safety
and Health Administration (OSHA) on April 2, 2003.[85] In her complaint she alleged that ACA had terminated her employment after she discovered and reported a scheme to defraud shareholders and members of the pilot's union.[86] Platone claimed that on or about March 3, 2003, she brought to Rodgers' attention her discovery that the company had created, or had acquiesced in, a scheme to funnel improper payments to members of the union's master executive council.[87] According to Platone's complaint, the payments totaled more than
$125,000.00 since November 2002.[88] Platone indicated that she "reasonably believed" that the flight pay loss scheme she uncovered violated Federal mail and wire fraud statutes and SEC Rule 10b-5.[89] Platone also alleged that the losses had not

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[84] *Id.* at 474, 479-480, 636-637, 691.

[85] April 2, 2003 (OSHA) Complaint at 1.

[86] *Id.*

[87] *Id.* at 3-4, ¶ 10.

[88] *Id.* at 5, ¶ 14. The alleged $125,000.00 in ACA losses was calculated by taking a flight pay loss average of $25,000.00 per month and multiplying it by 5 months, covering the period of November 2002 to March 2003. TR at 589-590.

[89] OSHA Complaint at 6, ¶ 19.

been reported
to shareholders in violation of the laws and rules of the United States. Securities and Exchange Commission (SEC). [90]Additionally, she alleged that her March 19, 2003 termination for a conflict of interest was a pretext.[91]
OSHA denied Platone's complaint on July 18, 2003.[92] The denial was based upon Platone's failure to establish that she engaged in protected activity. On August 14, 2003, Platone requested a hearing before the Office of Administrative Law Judges.

After a four-day hearing, the ALJ issued her recommended decision on April 30, 2004. ACA Holdings had argued that Platone was not one of its employees, but was instead employed by ACA. And because ACA was not a Company or Company representative as defined under the Act and
implementing regulations, Platone's complaint should be denied.[93] In addressing ACA Holdings' argument, the ALJ acknowledged the corporate law principle that a parent company was not liable for the acts of its subsidiary. However, she found that ACA Holdings had disregarded ACA's separate corporate identity in its dealings with the public, the SEC, and with its own employees. The ALJ, therefore, held ACA Holdings liable on the grounds

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[90] *Id.* at 5, ¶ 14.

[91] *Id.* at 6, ¶ 18.

[92] OSHA advised ACA Holdings of its decision on July 22, 2003.

[93] Respondent's Post-hearing Brief at 29.

that it was ACA's alter ego.[94]

With respect to the complaint's merits, the ALJ found that Platone had a "rational and reasonable basis for her belief" that Rodgers, and perhaps others at ACA, were "complicit" in a scheme to compensate pilots improperly in hopes of gaining contract concessions.[95] Additionally, the ALJ found that such a scheme, by its very nature, would involve the use of the mail and wires, and could constitute fraud on ACA Holdings' shareholders.[96] The ALJ, therefore, concluded that Platone engaged in protected activity under the Act when she reported her "suspicions" to Rodgers and then Bauman.[97] The ALJ further found that Platone's employer was aware of her protected activity and that her termination constituted an unfavorable personnel action.[98] On the question of causal relationship, the ALJ found that Platone's termination was due to her protected activity as well as her failure to disclose her romantic involvement with Swigart.[99] But despite one non-discriminatory basis for the March 19, 2003 termination, the ALJ concluded that ACA Holdings had violated the Act because it was unable

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[94] R. D. & O. at 20-21.

[95] *Id.* at 25.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 26.

[99] *Id.* at 29.

to demonstrate that it would have terminated Platone solely on the basis of her relationship with Swigart.[100]

The ALJ also issued a supplemental decision on July 13, 2004, recommending that Platone receive an unspecified amount of damages for back pay, vacation pay and medical expenses, plus litigation costs and attorney fees totaling $174,759.88. ACA Holdings filed a timely appeal on July 27, 2004.

ISSUE

The issue we consider dispositive is whether Platone engaged in protected activity under the Act.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the Board.[101] In cases arising under the Sarbanes-Oxley Act, we review the ALJ's factual determinations under the substantial evidence standard.[102] However, the Board exercises de novo review with respect to the ALJ's legal conclusions.[103]

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[100] *Id.* at 30.

[101] *See* Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110 (2005).

[102] 20 C.F.R. § 1980.110(c). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-51, slip op. at 7 (ARB June 29, 2006).

DISCUSSION

Section 806 of the Sarbanes-Oxley Act prohibits covered employers from retaliating against employees for providing information or assisting in investigations related to listed categories of fraud or securities violations. This section provides:

(a) Whistleblower Protection For Employees Of Publicly Traded Companies. No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee–

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by–

(A) a Federal regulatory or law enforcement agency;
(B) any Member of Congress or any committee of

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[103] *Getman v. Southwest Sec., Inc.*, ARB No. 04-059, ALJ No. 2003-SOX-8, slip op. at 7 (ARB July 29, 2005).

Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.[104]

As pertinent to this case, the SOX's employee protection provision thus protects employees who provide information to a covered employer regarding conduct that the employee reasonably believes constitutes a violation of 18 U.S.C.A. §§ 1341 (mail fraud), 1343 (wire, radio, TV fraud), 1344 (bank fraud), or 1348 (securities fraud), or any rule or regulation of the Securities and Exchange Commission (*see, e.g.,* 17 C.F.R. Part 210 (2005), Form and Content of the Requirements for Financial Statements), or any provision of Federal law relating to fraud against shareholders.

The Federal mail and wire fraud statutes Platone identified in her April 2, 2003 OSHA complaint, make it unlawful to use the mails, private parcel services, and various wire, radio, or television transmissions for purposes of planning or executing "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

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[104] 18 U.S.C.A. § 1514A.

pretenses, representations, or promises...."[105] These statutes are not by their terms limited to fraudulent activity that directly or indirectly affects investors' interests.[106]However, when allegations of mail or wire fraud arise under the employee protection provision of the Sarbanes-Oxley Act, the alleged fraudulent conduct must at least be of a type that would be adverse to investors' interests.[107]

SEC Rule 10b-5, which Platone also referenced in her OSHA complaint, provides as follows:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

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[105] 18 U.S.C. §§ 1341, 1343.

[106] In contrast, 18 U.S.C.A. § 1348, entitled "Securities fraud," was enacted under Section 807 of the Sarbanes-Oxley Act of 2002, and by its terms, this section is also limited to fraud "in connection" with "any security" or the "purchase or sale of any security."

[107] The preamble to the Act states: "To ***protect investors*** by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes. Sarbanes-Oxley Act of 2002, Pub L. No. 107-204, 116 Stat. 745 (2002) (emphasis added).

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
in connection with the purchase or sale of any security.[108]

The elements of a cause of action for securities fraud, such as a violation of SEC Rule 10b-5, are rooted in common-law tort actions for deceit and misrepresentation.[109] The basic elements include a material misrepresentation (or omission), scienter, a connection with the purchase or sale of a security, reliance, economic loss and loss causation – a causal connection between the material misrepresentation and the loss.[110] A fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.[111]With respect to omissions of fact, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[112]

To prevail on her SOX complaint, Platone must prove by a preponderance of the evidence that: (1)

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[108] 17 C.F.R. § 240.10b-5 (2005).

[109] *Dura Pharm. Inc. v. Broudo*, 544 U.S. 336, 341 (2005).

[110] *Id.* at 341-42.

[111] *Basic v. Levinson*, 485 U.S. 224, 231-32 (1998).

[112] *Id.* at 231 (citing *TSC Indus., Inc. v. Northway Inc.*, 46 U.S. 438, 449 (1976)).

she engaged in protected activity or conduct (i.e., provided information to a covered employer); (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.[113] If Platone succeeds in establishing that protected activity was a contributing factor, then the employer may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of her protected activity.[114]

On appeal, ACA Holdings continues to object to its designation as a party to the complaint. For the purpose of our decision, we assume without holding that the ALJ correctly ruled that ACA Holdings was a proper respondent. Our review of Platone's whistleblower claim addresses the issue of whether she engaged in protected activity. Because we hold that she did not, her inability to establish that element of her SOX cause of action is fatal to her claim, and we need not address other issues raised on appeal.

Platone's Alleged Protected Activity

We disagree with the ALJ's legal conclusion that Platone engaged in SOX-protected activity. In defining the scope of protected activity under other

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[113] *See* 18 U.S.C.A. § 1514A(b)(2)(C); 49 U.S.C.A. § 42121(b)(2)(B)(iii); *see also Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114 & 04-115, ALJ Nos. 2004-SOX-20 & 2004 SOX-36, slip op. at 9-10 (ARB June 2, 2006); *Getman*, slip op. at 8.

[114] *See* 49 U.S.C.A. § 42121(b)(2)(B)(iv).

Federal whistleblower protection provisions, the Board has held that an employee's protected communications must relate "definitively and specifically" to the subject matter of the particular statute under which protection is afforded.[115] The Corporate and Criminal Fraud Accountability Act of 2002 does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills. Rather, under the SOX, the employee's communications must "definitively and specifically" relate to any of the listed categories of fraud or securities violations under 18 U.S.C.A. § 1514A(a)(1). Thus, for example, an employee's disclosure that the company is materially misstating its financial condition to investors is entitled to protection under the Act. Applying these principles, we examine the information Platone provided to ACA.

Platone's flight pay loss investigation and her communications with Rodgers and Bauman regarding this particular issue occurred over a two-week period spanning late February and early March 2003. The relevant communications included various e-mail exchanges and conversations with both Rodgers and Bauman. ACA terminated Platone's employment on March 19, 2003, and she filed her OSHA complaint on April 2, 2003. In determining whether Platone engaged in protected

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[115] *See e.g., Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 9 (ARB Sept. 30, 2003) (in whistleblower complaint arising under Energy Reorganization Act (ERA) of 1974, 42 U.S.C.A. § 5851 (West 1993), protected activity must "definitively and specifically" relate to nuclear safety).

activity, the relevant inquiry is not what she alleged in her April 2, 2003 OSHA complaint, but what she actually communicated to her employer prior to the March 19, 2003 termination.

Platone's March 3, 2003 e-mail exchange with Rodgers represents their first substantive communication regarding the flight pay loss issue. She forwarded him an e-mail she had originally sent to Schep which stated in relevant part:

As you may know, there are instances where ALPA reps have picked up trips or traded for trips on originally
scheduled days off, which ended up being dropped for ALPA business. After speaking with someone in ALPA's accounting department, I was told that ALPA policy does not cover reimbursement to the company for billing the association for dropping trips picked up on originally scheduled days off.[116]

Platone also indicated that "[ACA is] paying the pilots for these occurrences now and billing ALPA for the time dropped."[117] She expressed concern that this practice could cause a problem for ACA accounting later as "ALPA does not pay."[118] Platone asked Schep for her advice on how to handle the situation. Schep recommended first advising ALPA of the situation and in the future, if a trip was picked up on an off day and later dropped for ALPA business, the time should then revert back to its original day off status.[119] Platone forwarded the

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[116] CX-28 at 2.

[117] *Id.*

[118] *Id.*

[119] *Id.*

Schep e-mail to Rodgers and asked him how she should proceed. His initial response was "If National ALPA is not paying the company for pilots on their days off, then <[ACA is] not paying the pilots."[120]

Platone's March 3, 2003 e-mail exchange with Rodgers does not constitute protected activity. She did not provide information about conduct she reasonably believed constituted a violation of "18 U.S.C.[§§] 1341[mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders...."[121] Platone raised a possible violation of internal union policy and she expressed concern on how this might affect ACA's ability to collect a debt, but nothing approximating fraud against shareholders. Over the next few days Platone continued to exchange e-mails with Rodgers regarding the flight pay loss issue. In a March 5, 2003 e-mail, Platone advised Rodgers that Thomas told her over the telephone that "ALPA would pay for trip drops that were picked up on originally scheduled days off" and she had asked him to put it in writing.[122] Rodgers' response was consistent with his March 3, 2003 response – "do not pay our pilots removed for ALPA business on days off" until Thomas sends a document stating that ALPA will

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[120] *Id.* at 1.

[121] 29 C.F.R. § 1980.102(b)(1); *see Getman*, slip op. at 9-10; *Harvey*, slip op. at 14-15.

[122] RX-3.

pay for pilots on days off.[123] In a follow-up e-mail later that afternoon, Platone explained to Rodgers how she was able to determine that ALPA pilot-representatives had picked up trips with the intent of dropping them to attend previously scheduled union-related business.[124] Once again, the e-mails Platone exchanged with Rodgers on March 5, 2003, do not provide information concerning conduct that even arguably represents possible fraud against shareholders. What is evident is that Rodgers and Platone were working together to resolve a potential ACA billing problem. Consequently, Platone's March 5, 2003 communication with Rodgers regarding the flight pay loss issue does not constitute protected activity.

On March 6, 2003, Platone forwarded Rodgers a draft letter for Thomas regarding RFS and flight pay loss issues.[125] The portion of the draft regarding flight pay loss billing seeks clarification from the union about its policy regarding payment for pilots removed from schedule for days that were originally awarded as days off. The draft letter indicates that unless otherwise advised in writing, ACA will process the removal from schedule request as usual, but it would not pay the pilots for flight credit hours, and consequently, ACA would not bill ALPA for the time.[126] Rodgers responded the following day, noting

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[123] *Id.*

[124] *Id.*

[125] CX-32.

[126] CX-33.

he was not interested in sending the letter.[127] Rodgers did not offer any explanation, but he did ask Platone how far ALPA was behind in paying its bills.[128] Platone testified that she saw Rodgers later that day and she asked him if he wanted her to "take another stab" at the letter and he replied, "Don't bother."[129] Platone's March 6, 2003 e-mail, the attached draft letter and her brief exchange with Rodgers on March 7, 2003, do not constitute protected activity under the Act. She did not provide specific information regarding fraud against shareholders, but merely continued in her efforts to address the potential billing issue between ACA and ALPA regarding flight pay loss.

When Platone returned to work on Monday, March 10, 2003, Rodgers met with her to discuss a few job performance issues.[130] According to Platone, one of the issues was the status of ALPA flight pay loss billing. Platone indicated that she updated Rodgers on meetings she had with accounts payable, the crew resources department, and ACA's controller.[131] She also reported that ALPA had been billed through October 2002, and that labor relations assumed responsibility for ALPA billing beginning with the month of November 2002.[132] Additionally,

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[127] CX-32.

[128] *Id.*

[129] TR at 288-89.

[130] *Id.* at 294-95.

[131] RX-19 at 13.

Platone reported that Rodgers told her that he wanted to get the money owed ACA.[133] Much like the earlier conversations and e-mails exchanged between Rodgers and Platone, their March 10, 2003 meeting did not include any specific revelations about fraudulent activity affecting shareholder interests. As such, Platone's March 10, 2003 communication with Rodgers does not constitute protected activity.

Platone also met with Rodgers on March 11, 2003. Rodgers planned to discuss concerns about Swigart's recent disclosure of his romantic relationship with Platone. The meeting ended prematurely after Platone indicated that ALPA was out to get her and she felt she was working in a hostile and threatening environment.[134] Platone testified that the union had been aware that she and Swigart had dated for months and she told Rodgers she was upset about the union now making a big deal about their relationship.[135] Rodgers testified that Platone did not allege any wrongdoing on the part of ACA in their meetings on March 10 and 11, 2003.[136] Platone's March 11, 2003 conversation with Rodgers concerning her relationship with Swigart does not constitute protected activity under the Act.

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[132] *Id.*

[133] *Id.*

[134] TR at 298-99, 303, 364, 469, 620.

[135] *Id.* at 299.

[136] *Id.* at 469-470.

Because of Platone's allegation of a hostile work environment, Rodgers arranged for her to meet with Bauman and Davis on March 12, 2003.[137] Platone testified that she told Bauman that she was "trying to get to the bottom of something with flight pay loss," and she thought "it was illegal ... what some of the pilots were doing."[138] She also told Bauman "[t]hey were cheating ... the company [out] of money...."[139] Platone also told Bauman that she and Rodgers had discussed the matter and she "wrote a letter and then nothing, and they're all mad about it now...."[140] Davis' notes of the March 12, 2003 meeting include at least two references to flight pay loss, one of which indicates Platone's belief that "ALPA [was] after her" for "questioning flight pay loss."[141] Bauman testified that Platone did not accuse Rodgers of any wrongdoing.[142] Platone similarly testified that she had not implicated Rodgers in any wrongdoing when she spoke with Bauman and Davis on March 12, 2003.[143]

Platone's March 12, 2003 conversation with Bauman and Davis does not constitute protected activity. She did not provide any information about

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[137] *Id.* at 303.

[138] *Id.*

[139] *Id*

[140] *Id.* at 304

[141] CX-53 at 3, 7.

[142] TR at 628-29, 668.

[143] *Id.* at 409-10.

fraud against shareholders. While she expressed her belief that the pilots were cheating the company out of money, the real victim of any alleged impropriety was ALPA. At that time, both Platone and Rodgers had received assurances from the union that ALPA would reimburse ACA for flight pay loss incurred on days that were originally scheduled as off days.[144] Rodgers represented that once ACA had been assured of reimbursement from ALPA, the issue of whether ALPA pilot-representatives had intentionally violated internal union policy was for ALPA to decide.[145]

After the March 12, 2003 conversation with Bauman and Davis, there is no mention of any additional substantive communications between Platone, Rodgers or anyone else at ACA regarding the flight pay loss issue. Platone learned of her suspension on March 13, 2003, and ACA subsequently terminated her employment on March 19, 2003.

Contrary to what she alleged in her April 2, 2003 OSHA complaint, Platone did not inform Rodgers and others at ACA that "the company had created, or had acquiesced in, a scheme to funnel improper payments to members of the union's master executive council."[146] The above-mentioned e-mails and conversations demonstrate that Platone did not provided her employer with specific information regarding "any conduct the employee reasonably believes constitutes a violation of 18 U.S.C.[§§]

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[144] *Id.* at 458, 481, 576; RX-3.

[145] TR at 458, 481, 576.

[146] OSHA Complaint at 3, ¶ 10.

1341[mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders...."[147] Furthermore, Platone's April 2, 2003 allegation that ACA violated SEC Rule 10b-5 is baseless. Her revelations to Rodgers and others at ACA do not even approximate any of the basic elements of a claim of securities fraud – a material misrepresentation (or omission), scienter, a connection with the purchase, or sale of a security, reliance, economic loss and loss causation.[148] Additionally, Platone did not identify a fraudulent scheme "in connection with the purchase or sale of any security."[149] At the hearing, Platone testified to less than $1,500.00 of potential losses to ACA.[150] It is unlikely that a reasonable shareholder would find a loss of less than $1,500.00 material.

Thus, we decline to adopt the ALJ's finding that Platone engaged in protected activity. Because we hold that Platone did not engage in protected activity, we need not reach other

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[147] 29 C.F.R. § 1980.102(b)(1); *see Getman*, slip op. at 9-10; *Harvey*, slip op. at 14-15.

[148] *Dura Pharm. Inc.*, 544 U.S. at 341-42.

[149] 17 C.F.R. § 240.10b-5 (2005).

[150] *See supra*, note 32. Platone alleged for the first time in her April 2, 2003 OSHA complaint that so-called "improper payments" to members of the MEC totaled more than $125,000.00. OSHA Complaint at 3-4, ¶ 10. However, at the ALJ's hearing Platone did not disclose any evidence that even remotely approached the $125,000.00 amount she alleged in her OSHA complaint.

issues raised on appeal, namely whether Platone's protected activity was a factor in her discharge, and whether ACA Holdings proved by clear and convincing evidence that Platone would have been discharged, notwithstanding her protected activity. Furthermore, because Platone has not prevailed on her SOX whistleblower complaint, she is not entitled to the damages, costs, and attorney fees the ALJ awarded in the July 13, 2004 Supplemental Recommended Decision and Order.[151]

CONCLUSION

Platone failed to establish that she engaged in protected activity under the Act. Accordingly, we do not adopt the April 30 and July 13, 2004 recommended decisions and we **DENY** the complaint.

SO ORDERED.

WAYNE C. BEYER, Administrative Appeals Judge, M. CYNTHIA DOUGLASS, Chief Administrative Appeals Judge

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[151] *See* 18 U.S.C.A. § 1514A(c)(1), (2); 29 C.F.R. § 1980.109(b).

APPENDIX C

U.S. DEPARTMENT OF LABOR

BEFORE THE ADMINISTRATIVE LAW JUDGE,
U.S. DEPARTMENT OF LABOR

IN THE MATTER OF STACY M. PLATONE AND
ATLANTIC COAST AIRLINES HOLDINGS, INC.

Case No.: 2003-SOX-00027

ISSUED: APRIL 30, 2004

Before LINDA S. CHAPMAN, Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding[1] arises from a complaint filed by Ms. Stacey M. Platone against Atlantic Coast

[1] Citations to the record of this proceeding will be abbreviated as follows: "Tr." refers to the Hearing Transcript; "CX" refers to Complainant's Exhibits; and "RX" refers to Respondent's Exhibits.

Airlines Holdings,Inc., alleging violations of the employee protection provisions in Section 806 of the Sarbanes-Oxley Act of 2002, codified in 18 U.S.C. § 1514A (hereinafter "the Act"). Enacted on July 30, 2002, the Act provides the right to bring a "civil action to protect against retaliation in fraud cases" under section 806. The Act affords protection from employment discrimination to employees of companies with a class of securities registered under section 12 of the Security Exchange Act of 1934 (15 U.S.C. 78l) and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C 78o(d)). Specifically, the law protects so-called "whistleblower" employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer or a federal agency or Congress relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344 or 1348, or any provision of Federal law relating to fraud against shareholders. All actions brought under Section 806 of the Sarbanes-Oxley Act are governed by 49 U.S.C. § 42121(b). 18 USC § 1514A(b)(2)(B).

On April 2, 2003, the Complainant, Stacy M. Platone, filed a Sarbanes-Oxley whistleblower complaint with the Occupational Safety & Health Administration (OSHA), U.S. Department of Labor. After conducting an investigation, OSHA's regional director issued two letters dated July 18 and 22, 2003 advising the parties that Ms. Platone's complaint lacked merit. Subsequently, Ms. Platone filed her objections with the Office of Administrative Law Judges, U.S. Department of Labor. A formal hearing was held before me in Washington, D.C., on November 14, 17, 20, and December 16, 2003, at

which times the parties were given the opportunity to offer testimony and documentary evidence, and to make oral argument. At the hearing, Complainant's Exhibits 1-5, 7-11, 13, 18, 20, 22, 28, 29, 32, 33, 37, 38, 40, 41, 44, 46, 47, 50, and 52-55, Respondent's Exhibits 1, 4-8, 15-17, and 19, and ALJ Exhibit 1 were admitted into evidence. The parties submitted post-hearing briefs pursuant to an Order Establishing Briefing Schedule dated January 15, 2004. I have reviewed and considered these briefs in making my determination in this matter.

STATEMENT OF THE CASE

Atlantic Coast Airlines Holdings, Inc. is a publicly traded company incorporated in the state of Delaware with its executive offices located in Dulles, Virginia. Its stock is registered on the NASDAQ National Market under the symbol ACAI. Atlantic Coast Airlines Holdings, Inc.'s (hereinafter "ACAI") wholly-owned subsidiary, Atlantic Coast Airlines (hereinafter "ACA"), is a steadily growing regional airline carrier established in 1989 with over 5,000 employees, including almost 1,600 pilots. Atlantic Coast Airlines recently announced the creation of its new identity and low-fare airline, Independence Air, which will operate out of Washington Dulles International Airport beginning in early 2004.

ACA's senior management is comprised of over a dozen individuals, including a few who serve simultaneously on ACAI's board of directors: Mr. Kerry Skeen is the Chairman of the Board of ACAI and the Chairman & CEO of ACA; and Mr. Thomas Moore is a member of the Board of Directors of ACAI and President & COO of ACA. Mr. Moore is the

direct supervisor of the labor relations department at ACA, who in turn reports directly to Mr. Skeen. Mr. Skeen has the authority to hire, fire, promote, or demote anyone within ACA's management.

Both parties introduced an assortment of documentary evidence in an attempt to illustrate the airline's precise corporate identity. Specifically, the record includes a multitude of various corporate manuals, press releases, SEC filings, Web pages, employment offer letters, and tax forms with either ACAI's or ACA's corporate logo and title generically affixed to the top or within the body of the document. The Respondent maintains that ACAI's logo and official title is used on most of its corporate letterhead in an effort to conveniently include the entire Atlantic Coast Airlines family of corporate entities under similar policies and directives.[2] Complainant, however, alleges that the corporate logos for both ACA and ACAI are used interchangeably because there is no practical distinction between the two entities.

The Form 10-K filed by ACAI with the Securities and Exchange Commission for the year ending

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[2] In fact, ACAI has only one operating subsidiary, ACA.

December 31, 2002, describes ACAI's business as follows: Atlantic Coast Airlines Holdings, Inc. ("ACAI"), is a holding company with its primary subsidiary being Atlantic Coast Airlines ("ACA"), a regional airline serving 84 destinations in 30 states in the Eastern and Midwestern United States and Canada as of March 1, 2003 with 850 scheduled non-stop flights system-wide every weekday. ACA operates under its marketing agreements as both a United Express carrier with United Airlines, Inc. ("United") and as a Delta Connection carrier with Delta Air Lines, Inc. ("Delta"). ACA's United Express and Delta Connection operations are conducted throughout the Eastern and Midwestern United States as well as Canada. Unless the context indicates otherwise, the terms "the Company", "we", "us", or "our" refer herein to Atlantic Coast Airlines Holdings, Inc. As of March 15, 2003, the Company operated a fleet of 142 aircraft "112 regional jets and 30 turboprop aircraft" having an average age of approximately 3.6 years.(CX 1, p. 5). The Form 10-K also indicates that "the Company derives substantially all of its revenues through its marketing agreements with United and Delta, operating under their United Express and Delta Connection brands, respectively.'

The Form 10-K describes the "Company's" fleet, as well as aircraft on order, and indicates that as of March 1, 2003, the "Company" had 4,311 full-time and 504 part-time employees. The Form 10-K describes the collective bargaining agreement entered into between the "Company" and its pilots, which are represented by the Airline Pilots Association (ALPA), its flight attendants,

represented by the Association of Flight Attendants (AFA), and its aviation maintenance technicians and ground service equipment mechanics, represented by the Aircraft Mechanics Fraternal Association (AMFA). It reflects that the "Company" has entered into agreements for pilot training involving simulators, and describes its internet website. *Id.* at p. 12.

According to ACAI's Form 10-K, the "Company" is under pressure to control and reduce costs, and has approached ALPA to negotiate wage reductions and work rule changes through voluntary concessions, noting that in order to achieve its cost reduction goals, the "Company" will require cooperation from its employees, major vendors, and code share partners. *Id.* at p. 18. The Form 10-K includes "Selected Consolidated Financial and Operating Data" for the years 1998 through 2002. *Id.* at p. 24.

As set out in ACAI's Form 10-K, the pilots employed by the "Company" are represented by ALPA, which is a major labor union for airline pilots from over 40 airlines in the United States and Canada that is responsible for the collective bargaining activities of 60,000 airlines pilots. (Tr. 36, 37). On a regular basis, the members of ACA's management team (often referred to as "management") meet and negotiate with members of ALPA (often referred to as "labor") to iron out various details, concessions, amendments, and other business related to the union's labor contracts and collective bargaining agreements. Within its management team, ACA has a labor relations group set up primarily to work directly with the various

unions, including ALPA. The labor relations group is headed by Jeff Rodgers, Senior Director of Labor Relations and Planning.[3] Mr. Rodgers was the Complainant's immediate superior and supervisor during her employ with the airline. Like many typical "management-labor" relationships, both ACA and ALPA respectively place individuals in "point" positions whose jobs are to manage the regular and direct interactions between labor and management.

Captain John Swigart, a pilot for ACA, testified at the hearing. Captain Swigart became a negotiating committee member in November 1995, and was elected as Chairman of the Master Executive Council (MEC) for ALPA in March 1999 (Tr. 60, 61). As MEC Chairman, Captain Swigart dealt directly with ACA management on a regular basis; his primary point of contact at ACA was the Senior Director of Labor Relations, Jeff Rodgers (Tr. 66).

According to Captain Swigart, after September 11, 2001, many in airline management were seizing the opportunity of fear to try to coerce pilots to give up pay and benefits. In his capacity as MEC Chairman, he met in weekly conferences with other MEC chairmen from other airlines to discuss these issues, and his union was approached by ACA management to negotiate new side letters of agreement (Tr. 64, 65). In his view, there was no doubt that cost cutting was an issue for management after September 11; the company was in a cost cutting mode, and had

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[3] Within ACA's corporate structure, Mr. Rodgers reports directly to Thomas Moore, who in turn reports directly to Kerry Skeen.

threatened to fire pilots out of seniority order (Tr. 65). Eventually, the union was able to work out concessionary side letters of agreement on cost issues (Tr. 65).

Ms. Platone also testified at the hearing. Before she began working for ACA, Ms. Platone worked for ALPA as a pilot communications specialist (Tr. 190), where she was responsible for communicating airline-specific and industry news to members of the union and the media. In January 2001, Ms. Platone met Captain Swigart, who was at that time the Chairman of the MEC for ALPA. At the time, ALPA had just reached a tentative agreement with ACA for a new collective bargaining agreement, which was scheduled to go to the membership for a vote (Tr. 190, 191). Ms. Platone worked on the "road shows," where the agreement was presented to the membership, working with Captain Swigart and Captain Jerry Smith, the Vice Chairman of the MEC. Over the course of these road shows, the three became friends (Tr. 193).

Captain Swigart testified that in the spring or summer of 2002, Ms. Coulter, the Director of Operations at ACA, told him that her position might open up, and that he should consider it. In June, he told Mr. Rodgers that he would be stepping down as MEC Chairman, and that he thought that the Director of Operations position might be available in the future (Tr. 69, 70). That same summer, ACA management created a new position within its labor relations department, Manager of Labor Relations, a position designed to create another point of contact between labor and management. Mr. Rodgers told Captain Swigart about this new position, and asked

him for suggestions. In turn, Captain Swigart told Ms. Platone about the new position, and that ACA wanted "fresh blood," someone with firm knowledge of the collective bargaining contract (Tr. 193). Captain Swigart told Mr. Rodgers that he had a candidate for the new position, and showed him Ms. Platone's resume (Tr. 430, 431). Ms. Platone also e-mailed her resume to Mr. Rodgers, and subsequently met with him, as well as Michael Davis, Michelle Bauman, Brian Mooney, and Cathy Bradley at ACA. Ms. Platone did not explicitly mention to anyone at these meetings that she had a close personal relationship with Captain Swigart (Tr. 197). Captain Swigart testified that Mr. Rodgers was aware that he and Ms. Platone were friends, but he did not know if Mr. Rodgers knew about their romantic relationship (Tr. 69-73).

Ms. Platone was interviewed for the position of Manager of Labor Relations in July of 2002 by a number of individuals from different departments within ACA management. During the interview process, Ms. Platone met with Mr. Rodgers; Thomas Moore; Michael Davis, at the time the Senior Vice President of Operations; and Michelle Bauman, at the time the Director of Employee Services and current Senior Director of Systems Control. Each individual expressed concern to Ms. Platone about her ability to make the direct move from ALPA to ACA; specifically, whether she could be loyal to ACA after working for the ALPA labor union. Ms. Platone testified that during her hiring interviews, Mr. Rodgers specifically asked her how she felt about switching from the "dark side," and whether she would have a hard time changing sides, as she had friendships and personal relationships with persons

in the MEC (Tr. 198, 199). Mr. Rodgers similarly testified that he had concerns about Ms. Platone's ability to switch sides, and that others involved in the hiring process also expressed such concerns. Ms. Platone assured him that she was loyal to the organization that employed her, and Mr. Rodgers was satisfied with that answer (Tr. 431-433). Ms. Bauman, who thought that Ms. Platone would do a good job in the position, also had some reservations about her ability to cross over. She expressed these concerns to Mr. Rodgers and to Ms. Platone, and she too was satisfied with Ms. Platone's response (Tr. 616). Ultimately, every individual who interviewed Ms. Platone was satisfied with her qualifications and assurances regarding her loyalty, and recommended her employment.

According to Ms. Platone, Mr. Rodgers told her that Captain Swigart spoke very highly of her work. Earlier, Captain Swigart had told her and Captain Smith that ACA wanted him to start distancing himself from the union. Both Captain Swigart and Captain Smith started taking steps to bring their pilot qualifications current, so that they could resume flying "on the line," and Mr. Rodgers helped them get into a class in July. During the interview meetings with Ms. Platone, Mr. Rodgers asked questions about Captain Swigart and Captain Smith going back to flight school, and repeatedly asked about Captain Swigart's intentions, and whether he was really leaving his leadership position with the MEC. He indicated to her that he had helped Captains Swigart and Smith get back into class so they could become current (Tr. 198, 300). She asked Mr. Rodgers not to tell anyone else that Captain

Swigart and Captain Smith planned to leave the MEC, as it was not yet public knowledge (Tr. 201).

In contrast, Mr. Rodgers stated that in the summer of 2002, he had no indication that Captain Swigart intended to leave his position as MEC chairman, and that he only learned about this in October 2002 (Tr. 441, 546).[4] He did not recall talking with Ms. Platone during the interview process about Captain Swigart leaving the MEC chairman position, or even that Captain Swigart's or Captain Smith's name came up (Tr. 551). He noted that after Captain Swigart announced that he was leaving, he still seemed to have some involvement in ALPA business (Tr. 443).

Captain Swigart left his position as MEC Chairman in October 2002, and played no further official role in the union or MEC (Tr. 75). He did play an informal role in the transition to a new Chairman, and occasionally advised the union on contractual questions (Tr. 76, 77). Captain Swigart was the author of most of the previous contract, and thus Captain Thomas, who succeeded him as MEC Chairman, asked him to come to the ALPA offices in early January 2003 for the national meeting, to talk about a concessionary package (Tr. 79).

Not long after her interview process, Ms. Platone received a letter from Mr. Rodgers with the offer of the job, setting out her salary and start date, dated July 23, 2002, on the letterhead of "Atlantic Coast Airlines Holdings, Inc." (Tr. 204, 205; CX 2).

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[4] Mr. Rodgers did acknowledge that he helped Captain Swigart get into a training slot (Tr. 545).

Mr. Rodgers told Justine Yingling, who worked part time as a labor relations specialist, that he had hired Ms. Platone for the position, and that she came from ALPA.[5] Ms. Yingling was concerned, but Mr. Rodgers told her that they had been over that with Ms. Platone, and he was confident that there would be no problems. Mr. Rodgers told Ms. Yingling that he was thankful she would still be in the department, that she was a loyal supporter, and that if she ever saw anything that raised concerns, she should come talk to him (Tr. 748).[6]

On August 19, 2002, the Complainant began working for ACA as the Manager of Labor Relations. As the point person for management, Ms. Platone was responsible for directly dealing with the various labor unions associated with ACA, including ALPA; she handled negotiations, grievances, and labor contract interpretations. Because of her position, Ms. Platone was often privy to confidential, sensitive, and proprietary information known only to members of ACA management.

At the heart of Ms. Platone's Sarbanes-Oxley claim is an issue that first arose in September, 2002: flight loss pay. "Flight loss" is the term given to the process by which ALPA reimburses ACA for costs incurred to

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[5] In October of 2002, Justine Yingling was a Labor Relations Specialist. Since Ms. Platone's termination by ACA, Ms. Yingling has assumed the role of Manager of Labor Relations.

[6] According to Ms. Platone, Ms. Yingling told her that Mr. Rodgers instructed her to spy on Ms. Platone, but when she confronted Mr. Rodgers, he denied it (Tr. 333).

pay pilots who are called away from flight duties in order to attend official ALPA business. Although somewhat more complex, flight loss simply shifts the cost of paying pilots from the company to the union: when a pilot member of ALPA leadership has particular union business to which she must attend, she can request to be removed from the airline flight schedule for that day. Because she is removed from a previously scheduled flight, the pilot attending ALPA business is still compensated by ACA as if she had completed the flight. In the meantime, ACA must find and pay a reserve pilot to pick up the flight now left empty by the pilot attending the ALPA business. This system costs ACA $20,000-25,000 per month. Fortunately for ACA, the collective bargaining agreement allows the airline to bill ALPA for the flight loss compensation it pays out to those pilots removed for ALPA business each month. In other words, "labor" and "management" have agreed that ALPA will bear ACA's pilot costs on those days the pilots are away on union business.

According to Captain Swigart, when pilots are removed from scheduled trips to do union work, the company bills the union. However, if that day was the pilot's day off, the union does not compensate the company (Tr. 81-82). Captain Swigart testified that when he was the MEC Chair, he was aware that there had been instances where an MEC member incurred flight loss pay because he switched a day off for a scheduled trip, and then dropped it for union work, but the union did not pay the pilot in those instances. He testified that his MEC Vice Chair ruled over the flight loss issue with an iron fist (Tr. 83).

Tiffany de Ris is ACA's Manager of Crew

Resources; she is in charge of processing pilots' time cards, answering crew requests, and awarding vacations (Tr. 711). Problems with flight pay loss were brought to her attention in July or August 2003, when something did not seem right, and in September, they really started looking at the issue (Tr. 714). According to Ms. de Ris, there was a discrepancy between the hours that ACA submitted for billing, and the hours that ALPA had on record (Tr. 715). Because Ms. Platone worked directly with the ALPA members, Ms. de Ris informed her of the discrepancies (Tr. 715). According to Ms. de Ris, ACA was billing ALPA on a quarterly basis, based on a verbal agreement (Tr. 715). Initially, Ms. Platone instructed the Crew Resources department to hold off on any further investigation and assured them that she would look into it. Ms. de Ris did not send the next bill to ALPA (Tr. 716).

In her position as manager of labor relations, Ms. Platone was not responsible for anything having to do with flight pay loss (Tr. 215). But in late October 2002, Ms. Platone discussed the flight records discrepancies with Jeff Rodgers and her subordinate, Justine Yingling, and they agreed that Ms. Platone and Ms. Yingling would set up a system to track flight loss. Ms. Platone felt that, even though tracking flight loss was not within her normal duties as Manager of Labor Relations, she was in a suitable position to help the airline resolve the billing problem with ALPA (Tr. 215, 216). Mr. Rodgers initially expressed concern about the flight loss discrepancies, and supported Ms. Platone's efforts to set up a tracking system. As she tracked flight loss over the next month, Ms. Platone regularly reported her findings to Mr. Rodgers, who told her not to

share the information with ALPA.

Captain Chris Thomas, who succeeded Captain Swigart as MEC Chairman, called Ms. Platone with concerns about how the flight loss pay system worked (Tr. 368). According to Ms. Platone, Captain Thomas was confused about who was authorized to make a request to be removed from the flight schedule, and the procedure for requesting removal (Tr. 216). She advised him that as the MEC Chairman, he could designate people to request removal from the flight schedule, and that he should just let ACA know who these persons were. She told him that any requests should be submitted by e-mail so that there would be a record (Tr. 218). She also talked to Captain Thomas about the multi-step procedure and form that she and Ms. Yingling had created (Tr. 218).

According to Ms. Platone, after Captain Thomas took over as the MEC chairman, he called on Captain Swigart in November and December for advice. But in January 2003, after Captain Thomas called Captain Swigart to ask him what he should do with ACA's request for concessions, the two had a falling out (Tr. 347-348). She acknowledged that she had made comments to her staff comparing Captain Thomas unfavorably with Captain Swigart, for instance, that the MEC under Captain Thomas was spending more money than Captain Swigart had when he was MEC chairman; that the union had a car, and was spending money on hotel rooms. In addition, Captain Thomas and Captain Hunt received raises from 92 to 103 hours a month. Mr. Rodgers asked her to do a spreadsheet to see if this was costing the company money, but when she tried to produce it, Mr. Rodgers told her not to worry

about it (Tr. 353-354).

Mr. Rodgers testified that the flight loss pay system was mismanaged, and that no one was keeping account of the pilots' time off; he wanted to establish a tracking system (Tr. 451). Although he was aware that Ms. Platone and Ms. Yingling were working together on this issue, he did not recall that he specifically gave them this responsibility. He did state that he asked them to look into whether the union was up to date in payments, and they advised him that the union was several months behind. He asked Ms. Platone and Ms. Yingling to see how far behind they were, and to go ahead and bill them (Tr. 452-453).

Since Captain Thomas had asked for her help, Ms. Platone worked with Ms. Yingling on a new trip drop request procedure for ALPA business. Ms. Platone thought it would be beneficial for ACA to have clear, reconciled records of trip drops each month, so that their bill to ALPA would be paid without challenge (Tr. 223). She sent a memorandum outlining the procedure by e-mail to Mr. Rodgers, with a form and instruction sheet (Tr. 221, 222; CX 20). She sent another e-mail to Mr. Rodgers on November 6, 2002, indicating that she was determined to put something in place, and that it would be very beneficial to ACA for tracking and billing purposes; she asked for his feedback (Tr. 225; CX 22). Mr. Rodgers subsequently left a copy of the attachments on her desk, with a notation of "no," that it was ACA's work, and none of ALPA's business (Tr. 218).

In the first week of December, Ms. Platone met with Ms. de Ris, Ms. Holcroft, and Ms. Purdue to discuss the status of flight pay loss for ALPA and ACA. Ms. Platone testified that she and Ms. Yingling

wanted to share the new tracking system they had developed, and see if they could help the other departments with their tracking for flight loss pay (Tr. 219, 220, 269). As it turned out, there were no problems with flight attendant billing (Tr. 272). Ms. Platone testified that she told them that ALPA had not been billed since May 2002, and that they should get everything out up to October, and give her the rest of the records (Tr. 270).

Ms. Platone did not receive the requested records and again asked for that information, including timecards, billing statements, and backup materials, in a subsequent "flight loss" meeting in January of 2003 (Tr. 271-272). According to Ms. Platone, Ms. de Ris told her that they had not provided her with the requested records because they were working on a training program so that Ms. Platone could take over the billing (Tr. 273). At the time of the January meeting, the flight loss bills had still not been sent to ALPA.

Ms. Platone learned from Ms. de Ris in February that ALPA had still not been billed for flight loss, and she told her to get the bills out (Tr. 274). Finally, in late February of 2003, by doing her own research, Ms. Platone obtained and was able to review some of the "flight loss" records on her own; she never actually received the records she requested from the crew resources department until March 7, 2003 (Tr. 275-278). After almost three months of tracking flight loss, Ms. Platone believed that some members of the ALPA union leadership were improperly taking advantage of the flight loss system for their own monetary gain. According to Ms. Platone, pilots have the opportunity in advance to review their upcoming schedules and make necessary changes.

Three of the four pilots she initially identified were members of the ALPA scheduling committee, and helped create the schedules each month (Tr. 259). Ms. Platone alleges that some ALPA members were purposefully asking to be assigned for a trip on days they were originally scheduled to have off from the ACA flight schedule—days on which official ALPA business also happened to be scheduled, thereby entitling those pilots to flight loss compensation. Because the pilots knew they would be removed from the flight schedule to attend ALPA business, they could deliberately rearrange their schedules to have a flight assigned to them on a day they had never intended to work. In short, ACA was paying pilots flight loss compensation on days it should not have been. In some circumstances, pilots were allegedly receiving an additional 20% of their salaries as a result of the flight loss abuse.

From her very preliminary review of the records she had managed to obtain, which included such bidding materials as timecards, schedules, and crew track materials, Ms. Platone identified Mike Rops, Tim Newkirk, Ricky Faruque, and Phil Forestburg as individuals whom she thought were abusing the flight loss system (Tr. 249, 252-253). With respect to Mr. Rops, Ms. Platone testified that the master schedule for January 2003 showed that he was off on January 8, 2003, and when he received the schedule, he knew that he was off on that day (Tr. 257).[7] Yet

[7] According to Ms. Platone, a pilot gets the schedules in the middle of the month for the next month, and has to bid for trips. The schedules come out at the end of the month, with trips being given to the most senior pilots. Mr. Rops was a junior pilot (Tr. 252-253).

Mr. Rops timecard for January 2003 showed that he was taken off flying duties on January 8 for union business (Tr. 255). According to Ms. Platone, she knew this was not a regularly scheduled day of work for Mr. Rops, because it did not count toward his guarantee; indeed, the time was above guarantee. This indicated that it was originally scheduled as a day off, but Mr. Rops added it to his schedule, and was later removed for ALPA business (Tr. 256).

Specifically, Ms. Platone noted that Mr. Rops was scheduled for training in January, with travel on January 13, and training on January 14 and 15. She found it odd that he was removed from the schedule, as it was unusual to remove a pilot who was scheduled for training, which is required by the FARS (Tr. 260-261). According to Ms. Platone, such a removal is uncommon, unless the pilot is sick and has a note from a doctor. Simulator training is expensive, and the time is at a premium (Tr. 262). The master schedule showed that Mr. Rops performed ALPA business on January 13 and 16, and was paid at the reserve rate. This did not make sense to Ms. Platone, and she felt that she needed more information (Tr. 263).

Ms. Platone also noted that the records showed that on January 28 and 29, Mr. Rops was paid above guarantee, which should not have happened. Additionally, the bid award showed that he was off on those days, but picked up reserve days, and then was removed for ALPA business (Tr. 264). All in all, Ms. Platone identified five days that were questionable with respect to Mr. Rops, which represented approximately twenty percent in additional salary paid to Mr. Rops (Tr. 267-268).

It took several days for Ms. Platone to review the

records for the four pilots, and in the last week of February, she shared her discoveries with her supervisor, Mr. Rodgers, and expressed concern about getting a handle on the situation (Tr. 266). She told Mr. Rodgers that ALPA had been billed only through September. Mr. Rodgers was also concerned, and told her to talk to accounting to find out what ALPA had paid and what they had been billed. Although she left numerous messages and e-mails requesting this information from the accounting department, Ms. Platone was never provided with this information (Tr. 276).

According to Ms. Platone, these four pilots were the only ones whose records she was able to thoroughly review. She was concerned that there were others, as there are more than fifty people in the MEC (Tr. 406). She testified that she provided the names of these four pilots to Mr. Rodgers and Ms. Schep, the Director of Crew Scheduling, in the first week of March (Tr. 250).

During the following week, on March 3, 2003, Ms. Platone sent an e-mail to Jennifer Schep,[8] asking for her thoughts and advice about the alleged flight loss abuse (Tr. 280). She also sent an e-mail to Mr. Rodgers asking for his input (CX 28). He told her that if the national union was not paying the company for pilots on their days off, the company would not pay the pilot; Ms. Platone asked him what she should do (Tr. 281). Ms. Platone testified that

[8] Ms. Schep is also known and referred to throughout the record as Jennifer Tripp.

she also called Ms. Kitty Lee in accounting about dropped trips; Ms. Lee told her that it was a blatant violation of ALPA policy, and that these pilots were considered to be "scum" at ACA (Tr. 280).

According to Mr. Rodgers, during the week of March 3, Ms. Platone sent him an e-mail stating that there was a group of pilots dropping trips, and the company was not being reimbursed by the union. She did not identify any specific individuals, although he recalled that she later identified Captain Faruque (Tr. 454). He testified that this was the first time he was aware of allegations of improper use of flight pay loss (Tr. 560). According to Mr. Rodgers, he asked Ms. Platone how she wanted to pursue it, but he did not recall telling her to draft a letter. He viewed the matter as an "initial concern" that needed to be addressed. But if the company got assurances from the union, and there was no evidence of any wrongdoing, he felt that they needed to move on (Tr. 560).

The following day, March 4, MEC Chairman Chris Thomas, who was a longtime friend of Ms. Platone's, showed up at her office, closed the door, and asked her what she was doing, and why she was so hot on the flight loss issue (Tr. 281). Ms. Platone explained to him that she was simply trying to straighten things out. Captain Thomas told her that she knew ACA did not have the resources to track flight loss, but she reminded him that they had spoken in November about tracking flight loss, and that she had created a spreadsheet to track it (Tr. 282). According to Ms. Platone, Captain Thomas was

upset (Tr. 284).[9] Ms. Platone told Captain Thomas that she was investigating the matter with the best interests of ACA in mind. She also warned him that "flight loss" abuse was a violation of ALPA's constitution and by-laws that could result in expulsion for unethical and improper practice (Tr. 379).

Mr. Rodgers sent Ms. Platone an e-mail on March 5, stating that until Captain Thomas sent a document stating that ALPA would pay for pilots' days off, the company would not pay the pilots (Tr. 383). Ms. Platone subsequently spoke on the telephone with Captain Thomas, and asked him for something in writing stating that if pilots traded trips ALPA would cover it. Captain Thomas told her he did not need to do that (Tr. 382, RX 7).

Ms. Platone testified that she then talked to Mr. Rodgers, telling him that she wanted to make sure ACA was covered; they discussed Ms. Platone writing a letter to memorialize the company's position (Tr. 284-285, 385). Mr. Rodgers, however, did not recall ever telling Ms. Platone to write such a letter to Captain Thomas (Tr. 458). In fact, he testified that he was not aware that the company had not been reimbursed for dropped trips; he

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[9] Ms. Platone had previously spoken with Captain Thomas about a pilot who was removed from the schedule after picking up a trip on his day off, and she told him that was not "kosher" policy. In addition, Captain Thomas and Captain Rops had asked her to remove another pilot from the schedule, and she disagreed with them about whether that was appropriate. In connection with this issue, Ms. Platone consulted Captain Swigart, Captain Smith, and Captain Fox, who supported her interpretation (Tr. 282-283).

Intended Ms. Platone to focus on what ALPA owed the company, and when they would pay (Tr. 460-461).

According to Mr. Rodgers, on Wednesday, March 5, Captain Thomas sent an e-mail to the MEC committee members, advising them that the union would not tolerate anyone acting unethically by picking up trips and later dropping them for ALPA business. Captain Thomas then called Mr. Rodgers, and told him that he understood that there were some accusations against him and other union members, and that he was looking into it. He assured Mr. Rodgers that ALPA would pay for flight loss, and that he was not aware of any inappropriate behavior by committee members (Tr. 456). After these assurances, Mr. Rodgers felt that it clearly was an internal ALPA issue; it was their committee, and their money. Further, he did not feel that there was any evidence that committee members picked up trips knowing that they would have to drop them later for ALPA business (Tr. 458

In line with her discussion with Mr. Rodgers, Ms. Platone prepared a letter to ALPA leadership, to make them aware that the company would bill them to bring pilots back on dead head trips for union business, and to discuss the issue of trip pickups on days off. Her draft cited to the flight loss rules in the ALPA administrative manual, and discussed the policy on flight loss (Tr. 285-288; CX 32, 33). On March 6, 2003, Ms. Platone relayed her draft letter to Mr. Rodgers via e-mail for his review (CX 32, 33).

Earlier that same day, March 6, Captain Thomas and Captain Rops met with Mr. Rodgers. According to Mr. Rodgers, Captain Thomas stated that he was having difficulty working with Ms. Platone. Mr.

Rodgers' recollections were vague; he recalled that they discussed something about vacation, and two or three other issues. He did not remember if they discussed the flight pay loss issue (Tr. 447).[10] This was the first time Mr. Rodgers had heard of any problems with Ms. Platone. According to Mr. Rodgers, and contrary to Ms. Platone's understanding, Captain Thomas and Captain Rops did not tell him that they would not work with the company's labor relations department if Ms. Platone was still there (Tr. 447, 562). He did not believe that the problem was Ms. Platone's investigation of flight loss, and in fact he did not recall if the issue of flight loss or trip drops came up at all in the meeting (Tr. 563).

Ms. Platone sent her e-mail regarding the flight pay loss issue, with her draft letter, to Mr. Rodgers later that day. Mr. Rodgers testified that he did not recommend sending the letter because there was no evidence of any intentional wrongdoing. He felt that the letter was too strong. Additionally, he felt that this was an internal ALPA issue; Captain Thomas had assured him that his investigation found no wrongdoing, and that the company would get reimbursed for trips (Tr. 460). According to Mr. Rodgers, he had asked Ms. Platone to focus on the bigger issue of whether the union owed money to the

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[10] Indeed, although Captain Thomas had sent him an e-mail about flight pay loss the day before, and called him to discuss it, Mr. Rodgers could not recall the subject of flight pay loss coming up on this day (Tr. 568-570; CX 29).

company; if there was something there, he wanted her to show him the evidence, but he did not want her to accuse someone of unethical behavior. He testified that he asked Ms. Platone how she could tell if a pilot was deliberately picking up flights, and then dropping them for union business. Ms. Platone sent him an e-mail on this issue, but he felt it did not cover all areas. He testified that he was not aware of any detailed information on Captains Rops, Faruque, Forestburg, or Newkirk (Tr. 574-575).

Mr. Rodgers testified that he did not know if he called Captain Thomas after receiving this e-mail from Ms. Platone, but he acknowledged that his cell phone records reflected a call to the MEC office at 6:06 p.m. that day (Tr. 566-567).

On March 7, 2003, just days before ACA and ALPA were scheduled to engage in concessionary negotiations, Mr. Rodgers responded to Ms. Platone by telling her that he was not interested in sending the letter to ALPA. Ms. Platone was taken aback, and thought that she had touched a nerve. Later that day, Ms. Platone approached Mr. Rodgers and asked him if she should "take another stab" at writing the letter. According to Ms. Platone's testimony, he replied, "Don't bother," and instructed her not to do anything else. At that time, Ms. Platone knew she had hit a nerve (Tr. 288). Mr. Rodgers testified that because there was no evidence of any intentional wrongdoing, and because any potential "flight loss" abuse was strictly an "internal ALPA issue," he did not want to send the letter to ALPA. Later that day, Ms. Platone received an e-mail from Mr. Rodgers, asking her to remove the members of the ALPA negotiating committee from the flight schedule for the following week, so that

they could re-engage in concessionary negotiations (Tr. 289). Mr. Rodgers did not tell her about the meeting that he had just had with Captains Rops and Thomas (Tr. 571-572, CX 32).

According to Ms. Platone, at that time the company was in desperate circumstances: United, which accounted for 85% of the company's business, filed for bankruptcy in December 2002. The company needed a new contract with United that would cut costs. Ms. Platone stated that very few cost items can be controlled. Although the company did a good job with aircraft costs, they were still faced with fuel and labor costs. In December, in negotiations with ALPA, the company was obsessed with getting concessions from the pilots (Tr. 306-307). In her view, by creating a system for accounting and tracking flight loss for the company, this process would be consolidated, billing would be easier, and future abuses would be prevented (Tr. 307). In this context, she viewed Mr. Rodgers' instruction not to send the letter, and that he did not want to talk about the issue anymore, as inconsistent with the "cutting all costs" mode; it did not make sense to her that something that was so beneficial for the company would be stopped dead in its tracks (Tr. 309). She thought that if the company let the issue go, the pilots would give concessions, which they ultimately did (Tr. 310).

On Saturday, March 8, 2003, while Ms. Platone was with Captain Swigart, Captain Swigart received a phone call on his personal cell phone from his successor as MEC Chairman, Chris Thomas. Mr. Thomas indicated that there was a problem with Ms. Platone, that she was a "filter" for the MEC, and that the airline was investigating her. Mr. Thomas

told Captain Swigart that Mr. Rodgers had her phone records (Tr. 142). Captain Swigart then spoke with Ms. Platone, who mentioned something about flight loss (Tr. 142). According to Ms. Platone, Captain Swigart told her that Captain Thomas was in Mr. Rodgers' office the day before, that Mr. Rodgers had showed him her phone records, and that she should be worried about her job (Tr. 291). Captain Swigart told her that Captain Thomas said that she was harping about billing issues; when Captain Swigart asked him what he was talking about, Captain Thomas said "this whole flight loss thing," that she was pushing it. When Captain Swigart asked why it was a problem, Captain Thomas said that it just was. After the telephone call, Captain Swigart asked Ms. Platone about it. She told him that she was trying to get something straightened out with the company and the union; she also told him about the letter she had drafted, and Mr. Rodgers' reaction (Tr. 291, 392).

Confused, Captain Swigart immediately called Jeff Rodgers, and asked him why Ms. Platone was under investigation, and whether her phone records were being reviewed. Mr. Rodgers claimed that he knew nothing about it and in fact enjoyed working with Ms. Platone (Tr. 143). At the start of his conversation with Mr. Rodgers, Captain Swigart mentioned he was concerned because he was dating Ms. Platone; he testified that Mr. Rodgers did not express shock at this disclosure (Tr. 144-145). Mr. Rodgers claims that that was the first he had heard of their romantic relationship, and he was not quite sure how to handle it or whether their relationship was considered inappropriate.

Mr. Rodgers' recollection was that Captain Swigart

called to tell him that he was dating Ms. Platone, and that he had told the MEC he was not, so that they would leave him alone. At the end of the conversation, Captain Swigart asked him if he could do anything to help with problems with the current MEC, and in helping them understand issues surrounding the company (Tr. 463). According to Mr. Rodgers, he asked Captain Swigart to educate the new MEC. He only vaguely remembered Captain Swigart mentioning a phone call from Captain Thomas. Mr. Rodgers testified that this was the first he had heard that Ms. Platone and Captain Swigart were dating, and he was "stunned." However, he did not express this disbelief to Captain Swigart, because he had been caught off guard. He did call Ms. Bauman and leave her a voice message describing the call, and on Monday, he talked to Mr. Moore about the fact that Ms. Platone was dating Captain Swigart (Tr. 462-465). Mr. Rodgers testified that he was very much bothered by the news that Ms. Platone was dating Captain Swigart. He felt betrayed, after he had protected her from previous complaints (Tr. 466). He also testified that he knew of no investigation of Ms. Platone; he did not recall looking at her phone records (Tr. 462). However, he did testify that on March 10, he reviewed Ms. Platone's e-mails (Tr. 514).

Ms. Bauman confirmed that in early March, on a weekend, Mr. Rodgers called her to say that he had additional concerns about Ms. Platone's performance, and some new information. They spoke the following Monday; Mr. Rodgers was concerned about performance issues related to communication. But his primary concern was a telephone call he had received advising him that Ms. Platone had a

relationship with a previous MEC Chair. He was concerned about Ms. Platone's ability to do her job, and felt that he could not trust her anymore (Tr. 618). She was surprised when she found out that the person was Captain Swigart; Mr. Rodgers told her that it was the first he had heard of it. Ms. Bauman was concerned because of the nature of Ms. Platone's position, and the type of information to which she potentially had access (Tr. 619). She testified that she told Mr. Rodgers that he needed to document the performance issues and discuss them with Ms. Platone, as well as the relationship issue. She recommended that he talk with her about the performance issues first, and then about the relationship.

According to Mr. Rodgers, Ms. Bauman and Mr. Steindler came to his office to discuss this issue. They recommended that he conduct two separate meetings with Ms. Platone, one to focus on performance issues, and one to focus on her relationship with Captain Swigart (Tr. 467).

On the following Monday, March 10, 2003, Ms. Platone met with Mr. Rodgers to discuss what had happened over the weekend. Mr. Rodgers also spoke with Tom Moore on March 10th regarding Ms. Platone and her relationship with Captain Swigart. According to Ms. Platone, Mr. Rodgers indicated that ALPA was upset because she was harping on billing issues. Ms. Platone had never heard any complaints of her inability to get along with ALPA before this time (Tr. 294). Nor did Mr. Rodgers indicate to her that he had just learned of her relationship with Captain Swigart (Tr. 293-294).

Mr. Rodgers' recollections of this meeting were vague; he remembered only that they discussed two

or three issues, and that he told Ms. Platone about the issues that Captains Thomas and Rops brought up (Tr. 564). But he did not recall telling Ms. Platone that the MEC or ALPA leadership would not work with the company if Ms. Platone was still there. He testified that he was satisfied with the outcome of the meeting (Tr. 468). Concessionary negotiations took place as scheduled on Monday, March 10 (Tr. 295).

On Tuesday morning, Ms. Platone received a call from Captain Thomas, stating that he wanted all of the ALPA negotiating people put back on the trip schedule. Ms. Platone asked if he was sure, and Captain Thomas told her that they had nothing left to discuss with the company. Ms. Platone called Mr. Rodgers, and asked why Captain Thomas was being so quick about this; Mr. Rodgers told her to put them back on the flight schedule (Tr. 295-296). Later that day, Tuesday, Mr. Rodgers called Ms. Platone into his office, and told her that ALPA was upset with the billing issues, and felt that she was obstructive, and would not continue to work with the company while she was there (Tr. 296-297). Again, Ms. Platone was sure that she had touched a nerve with her letter (Tr. 297). Mr. Rodgers then told her that he had received a call from Captain Swigart, who told him that they were dating. Ms. Platone advised him that this was personal, but that they could talk about it. She told Mr. Rodgers that she was upset that all of a sudden the union was making a big issue of the fact that she was dating Captain Swigart, when they already knew about it (Tr. 298-299). Ms. Platone told Mr. Rodgers that his comments sounded threatening and hostile, at which point Mr. Rodgers terminated the meeting and called Ms. Bauman, the Director of

Employee Services, to tell her about Ms. Platone's accusations of hostility so that an investigation could commence (Tr. 469). Ms. Bauman called Ms. Platone a few hours later, and scheduled a meeting for the following day (Tr. 303). According to Ms. Bauman, it is a common practice for the employee services department to investigate any allegations of discrimination (Tr. 621).

According to Mr. Rodgers' version of this meeting with Ms. Platone, he told Ms. Platone about the telephone call from Captain Swigart, and asked her what she could do to make him feel comfortable about their relationship (Tr. 468). Ms. Platone responded that she could not. She also claimed that ALPA was always out to get her, and that she felt that she was working in a hostile and threatening environment. At that point, he called Ms. Bauman (Tr. 469). Mr. Rodgers testified that Ms. Platone did not make any allegations of wrongdoing by ACA in either meeting (Tr. 470).

On Wednesday, March 12, 2003, Ms. Platone met with Ms. Bauman and Susan Davis to discuss what had transpired over the previous week, in order to officially register a complaint (See CX 53). According to Ms. Platone, she told them that she was trying to get to the bottom of the flight pay loss issue, and that she thought the pilots were cheating the company out of money. She told them that Mr. Rodgers had twice told her that ALPA was mad because she was harping on billing issues. She also testified that she told Ms. Bauman and Ms. Davis that she had discussed writing a letter with Mr. Rodgers, but when she wrote it, nothing happened (Tr. 304). Ms. Platone told Ms. Bauman that she feared retaliation by Mr. Rodgers, as he was the one

who relayed the threat from the union, and he knew what she was doing with flight loss, but did not protect her. She told them that she knew that there was a problem, but for some reason Mr. Rodgers wanted to cover it up (Tr. 404-405).

Ms. Bauman testified that, since Ms. Platone told her that she had given the information about the flight pay loss issue to Mr. Rodgers, she assumed that it had been investigated, and she did not ask any further questions of Mr. Rodgers.

According to Ms. Bauman, Ms. Platone was very uncomfortable at this meeting. They told her that they would be starting an investigation, and needed to ask questions (Tr. 622). Ms. Platone told them that she was not comfortable talking with them, that people in the company had a lot of friends, and she did not want to talk further. She stated that someone in the company had it out for her, and did not want her to get the job. When pressed, she identified Ms. Yingling, Ms. Schep, and Ms. Powell. She also told them that ALPA was trying to get her out of her job (Tr. 623, 627). According to Ms. Bauman, Ms. Platone stated that she had no issues with Mr. Rodgers, and enjoyed working with him. She mentioned the issue of flight pay loss very briefly, saying that she felt very bad, because she did not want to hurt the company. But she had found out that ALPA was taking money they were not entitled to (Tr. 628).[11] Ms. Bauman testified that

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[11] In fact, Ms. Davis's notes of this meeting, produced for the first time at the hearing, refer to flight pay loss at least three times. They also indicate that Ms. Platone told them that Captain Thomas told Mr. Rodgers that he could not work with Ms. Platone (Tr. 689).

towards the end of the conversation, Ms. Platone stated that ALPA was treating her poorly and making her job difficult, and did not want her to be in her job because of her relationship with Captain Swigart (Tr. 629). Ms. Platone would not tell them how long she had had a relationship with Captain Swigart (Tr. 630).

Ms. Bauman testified that they asked Ms. Platone to provide a written statement documenting her concerns, and explaining why she felt that she was working in a hostile environment, and documenting the information that she disclosed during the meeting. No statement was received from Ms. Platone before she was terminated (Tr. 630-631).

Mr. Rodgers testified that after this meeting, Ms. Bauman told him that Ms. Platone had complimented his management, but stated that she had a conflict of interest, and felt that she was ineffective (Tr. 471). He subsequently met with Ms. Platone and Ms. Yingling to discuss a grievance, but he was very uncomfortable, and felt that there had been a breach of trust (Tr. 473).

Ms. Bauman concluded that no actionable discrimination had occurred, and the problem was simply rooted in a few individuals not getting along. According to Ms. Bauman, there was a conference call that week with herself, Mr. Steindler, Ms. Belcher, and Mr. Petesch about the conflict of interest and lack of trust issues (Tr. 632). Mr. Davis was concerned because there were many things going on at the company that involved the union, and the company was getting ready for negotiations, which meant that there was a lot of sensitive information that potentially could be passed on. He was also concerned that Ms. Platone did not disclose

the relationship when she was hired (Tr. 633). Ms. Bauman felt that Ms. Platone's personal relationship with Captain Swigart was incompatible with the proper discharge of the duties of her specific job (Tr. 634).

Mr. Rodgers testified that initially, the company decided to suspend Ms. Platone until they could figure out if they wanted to terminate her (Tr. 473). He claimed that he spoke to Ms. Bauman about finding Ms. Platone another position in the company, but Ms. Bauman felt that the situation was too far gone, there had been a breach of trust, and Ms. Platone could no longer work there. Mr. Rodgers did not recall discussing the flight pay loss issue during these meetings, and testified that these allegations did not enter into his decision to suspend Ms. Platone (Tr. 474, 479). Ms. Bauman also testified that the issue of flight pay loss did not enter into the discussion, and no one mentioned it (Tr. 636). According to Ms. Platone, when she asked why she was being suspended, she was not given a reason. She asked if it was because the union was upset about flight loss, but they refused to answer (Tr. 373).

Mr. Rodgers testified that he did not recall telling Captain Thomas that Ms. Platone was going to be suspended before the date it actually happened, and would not acknowledge telephoning him right after Ms. Platone was in fact suspended. However, he agreed that his telephone records reflect that Ms. Yingling was the first person he called after Ms. Platone was suspended, and that he then called the MEC telephone number (Tr. 599-601).

On March 19, 2003, Ms. Platone met with Robert Steindler and Emma Belcher, who told her that she

was being terminated because of her relationship with Captain Swigart (Tr. 365). According to Ms. Platone, she told them that Mr. Rodgers knew about the relationship, but never said anything, and that during the phone conversation on March 8, he told Captain Swigart that he did not have a problem with it (Tr. 367). Mr. Rodgers testified that the conflict of interest presented by this relationship was "one of the reasons" that Ms. Platone was terminated (Tr. 509). He testified that the circumstances surrounding a grievance by Captain Fox were also a factor in the decision to fire Ms. Platone (Tr. 538, 604-605). He testified that in general, there was a lack of trust of Ms. Platone (Tr. 604-605). According to Mr. Rodgers, he did not bring up Ms. Platone's concerns about flight loss, and he had no reason to believe that Ms. Belcher or Ms. Davis were aware of Ms. Platone's concerns (Tr. 598, 609).

Mr. Steindler testified that he was notified by Ms. Bauman that Ms. Platone was involved in an intimate relationship with Captain Swigart, the former MEC Chair (Tr. 846). He had discussions with Mr. Rodgers, Ms. Bauman, and Ms. Belcher, the main gist of which was that this relationship represented a conflict of interest, and created a lack of trust and confidence in Ms. Platone remaining in her position. Both he and Ms. Bauman recommended suspension and ultimately her removal (Tr. 847-848). It was Mr. Steindler's understanding that Ms. Platone was in this relationship when she was hired, but that she did not divulge it. Given her level at the company, and Captain Swigart's position at ALPA, and the natural relationship between union and management, he felt that this was a conflict that should have been disclosed from the beginning (Tr.

848). According to Mr. Steindler, the issue of flight pay loss was never discussed, and Mr. Rodgers never pressed him to recommend termination (Tr. 849-850).

Mr. Steindler testified that the termination meeting with Ms. Platone was very short. They told her that based on her failure to disclose the relationship, there was a lack of trust and confidence in her continued employment, and the decision had been made to terminate her. He recalled that Ms. Belcher also mentioned that there were other performance issues, and that Captain Fox's name "came up" (Tr. 851-852).

Although Captain Swigart stepped down as MEC Chairman in October of 2002, Mr. Rodgers and Mr. Moore believed that he was still active behind the scenes in ALPA business, and could learn of confidential information through Ms. Platone. Although Mr. Rodgers knew of no instances in which Ms. Platone shared confidential information with Captain Swigart, he feared she could no longer be loyal to ACA. Although Respondents introduced evidence that a member of the mechanics' union and others had had difficulty working with Ms. Platone, the Respondents maintain that Ms. Platone was terminated because they could no longer trust her.[12]

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[12] Kirk Taylor, a member of the aircraft mechanics union, testified that he had a poor working relationship with Ms. Platone during one particular grievance because Ms. Platone took a hard-line stance on behalf of ACA. Ms. Yingling and Ms. Schep had also complained about Ms. Platone to Mr. Rodgers regarding her performance and professionalism. All of the complaints were eventually resolved to Mr. Rodgers' satisfaction.

Mr. Rodgers insisted that the "flight loss" abuse issue played no role in the airline's decision to terminate Ms. Platone. At the hearing, Mr. Rodgers cited to the airline's company policy manual in support of the decision to terminate Ms. Platone; he claimed that she was improperly engaged in a personal relationship that was incompatible with the proper discharge of her duties (RX 6). At the hearing, Ms. Platone and Captain Swigart maintained that everyone at ALPA and ACA knew about their romantic relationship. However, every witness called on behalf of Respondents denied knowing for a fact that the two were romantically involved.

In addition to the relationship between Ms. Platone and Captain Swigart, the Respondents presented additional testimony purportedly bringing Ms. Platone's loyalties into question. The purpose of this evidence was not clear, as none of these incidents were identified as reasons for firing Ms. Platone, and indeed they had been satisfactorily dealt with in her evaluation in the fall of 2002. Captain Swigart admitted discussing airline business regularly with Ms. Platone, but made it clear that he and Ms. Platone never discussed confidential information. Ms. Platone admitted helping Captain Swigart draft and/or edit an ALPA hotline message directed to its members while he was MEC Chairman and she was working for ACA (RX 7). Ms. Platone explained she had assisted Captain Swigart with similar messages while she worked at ALPA, and insisted the August, 2002 message was beneficial to ACA as an attempt to reduce the number of grievances filed by pilots against ACA. Respondents presented testimony that

Captain Swigart was once involved in a pilot grievance in October 2002 while he was MEC Chairman and Ms. Platone was Manager of Labor Relations. And finally, as MEC Chairman, Captain Swigart also participated in a labor contract implementation meeting with Ms. Platone across the table. Even so, Mr. Rodgers testified he knew of no instances in which Ms. Platone shared confidential information with Captain Swigart.

Contrary to the Respondent's justifications, Ms. Platone contends that she was terminated, not because of her relationship with Captain Swigart, but because she revealed a plan by members of ACA management to improperly funnel the airline's money to members of the ALPA union through flight loss compensation. Ms. Platone believes that Jeff Rodgers asked her to back off of the "flight loss" abuse issue because the company was using it as bargaining leverage for upcoming negotiations with ALPA. Ms. Platone maintains that the flight loss bills had not been sent to ALPA in many months because management was hoping that by allowing some of the ALPA leadership to get away with receiving improper flight loss compensation, ALPA would be more willing to make concessions during the upcoming negotiations. At the time, all airlines were still feeling the repercussions of September 11th, and ACA was determined to launch its new low-fare airline. As a result, Ms. Platone believed the airline was "desperate" to extend its contract with United Airlines, which had filed for bankruptcy in December 2002. Mr. Moore and Mr. Rodgers testified that cutting costs was crucial to the future of ACA; the best way to cut costs, according to Ms. Platone, is to cut labor expenses through concessions from the

unions.[13] Ms. Platone believed that in order to cut labor costs, members of ACA management, including Mr. Rodgers, were willingly trading improper "flight loss" compensation for ALPA concessions. Ms. Platone believed this course of action to be in direct conflict with the best financial interests of the company.

On March 19, 2003, Ms. Platone's employment with ACA was officially terminated. At the time of the hearing, Ms. Platone was still unemployed.

ISSUES

1. Whether the Complainant qualifies as an "employee" of the Respondent under the terms of the Sarbanes-Oxley Act.

2. Whether the Complainant engaged in activities that are protected by the Sarbanes- Oxley Act.

3. Whether the Respondent, actually or constructively, knew of, or suspected, such activity.

4. Whether the Complainant suffered an adverse personnel action.

5. Whether the Complainant's activity was a contributing factor in the adverse personnel action that was taken against her.

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[13] Mr. Rodgers testified that pilots' salaries contributed to over 50% of the company's total wages; coupled with flight attendants, ACA pilots' salaries amounted to $120,000,000 in 2003.

6. Whether the Respondent demonstrated by clear and convincing evidence that it would have taken the same adverse personnel action regardless of whether the Complainant had engaged in protected activity.

DISCUSSION

The Sarbanes-Oxley Act states in pertinent part: No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee - -

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of sections 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by - -

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the

employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.18 U.S.C. § 1514A (a)(1); see also 29 C.F.R. § 1980.102(a), (b)(1).

Title 18 U.S.C. § 1514A(b)(2) provides that an action under Section 806 of the Act will be governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell Ford Aviation Investment and Reform Act for the 21st Century (the AIR 21 Act). Because of its recent enactment, the Sarbanes Oxley Act lacks a developed body of case law. As the whistleblower provisions of Sarbanes-Oxley are similar to whistleblower provisions found in many federal statutes, it is appropriate to refer to case authority interpreting these whistleblower statutes.

The Complainant is Covered under the Sarbanes-Oxley Act

The Sarbanes-Oxley Act provides whistleblower protection to "employees" of publicly traded companies. The Respondent argues that the Complainant was an employee of ACA, which is not publicly traded, but not of ACAI, its holding company, which is publicly traded. The interim regulations provide that the term "employee" includes an "individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative." Title 29 C.F.R. § 1980.1. "Company," in turn, is defined as any company with a class of securities registered under section 12 of

the Securities Exchange Act of 1934 (15 U.S.C. 78l) as well as any company required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); "company representative" means any officer, employee, contractor, subcontractor, or agent of a company.

In this case, although ACAI and ACA are undeniably separate corporate entities, I find that for purposes of determining whether the Respondent is properly charged, and whether Ms. Platone qualifies as an "employee" of the Respondent under the Sarbanes-Oxley Act, that the existence of separate corporate identities does not insulate the Respondent from liability. The record is replete with examples of various documents that use the two corporate logos and titles interchangeably. While the Respondent argues that this is merely a matter of convenience, the documents in the record lead to the inescapable inference that ACAI made a calculated business decision to use the two corporate names interchangeably. Thus, the Complainant received her offer of employment on letterhead that bore the ACAI logo. The Complainant's 401k plan is administered by ACAI. The Complainant was provided with a confidentiality agreement on ACAI letterhead "in connection with your employment relationship with the Company." The Complainant's employee benefits, including health and life insurance, were provided by ACAI. Her expense reports were submitted on forms that bore the logo of both ACA and ACAI. Personnel action forms were under the ACAI logo. These examples lead to the conclusion that ACAI held itself out as the entity ultimately responsible for ACA's actions.

Additionally, there is a great degree of commonality between the senior management of the two corporate entities. Thus, the Chairman and CEO of ACA, Kerry Skeen, is also the Chairman of the Board of ACAI. According to Michelle Bauman, Mr. Skeen has the authority to hire, fire, promote, or demote anyone within ACA's management. The President and CEO of ACA, Thomas Moore, is also a member of the ACAI Board of Directors; he is the direct supervisor of the labor relations department at ACA. Mr. Moore, along with Mr. Davis, Ms. Bauman, and Mr. Steindler, made the ultimate determination that the Complainant should be fired.

Clearly, ACAI and ACA made no attempt to keep their corporate identities separate in their day to day dealings with the public, with their employees, and with the SEC. Indeed, the Complainant's initial offer of employment was from ACAI, on ACAI letterhead. In its filings with the SEC, and in its press releases, ACAI promotes itself as an entity that provides flight service nationwide, services that are in fact provided by its subsidiary, ACA. It was not an accident that the corporate names were used interchangeably, and I find that the record supports the inference that Respondent perceived a business advantage in using these identities interchangeably. The Respondent cannot now be heard to complain that liability for the dismissal of the Complainant is solely attributable to its subsidiary, and that it shared no part in that action.

It is a general principle of corporate law that a parent corporation is not liable for the acts of its subsidiaries, and the mere fact of a parent-

subsidiary relationship between two corporations does not make one company liable for the torts of its affiliate. *United States v. Bestfoods, et al.*, 524 U.S. 51, 61 (1998). However, the law also recognizes that a parent corporation will be held responsible for the obligations of its subsidiary to third parties, when the subsidiary is a mere instrumentality of the parent corporation. Thus, where the evidence is sufficient to show that a parent corporation controls the subsidiary to such a degree as to make it a mere instrumentality, courts have held the parent corporation liable for the subsidiary's actions, as constituting the parent corporation's act accomplished through a controlled agency. *See, Liability of Corporation for Torts of Subsidiary*, 7 A.L.R.3d 1343.

Factors considered by the courts in determining whether a subsidiary is a mere instrumentality of the parent, such that the parent is liable for the acts of its subsidiary, include the existence of common stock ownership; common officers or directors; common business departments; filing of consolidated financial statements and tax returns; parent financing of the subsidiary; parent causing incorporation of the subsidiary; operation of the subsidiary with grossly inadequate capital; payment by the parent of salaries and other expenses of the subsidiary; sole source of business for the subsidiary is the parent; parent uses the subsidiary's property as its own; daily operations of the two corporations are not kept separate; and the subsidiary does not observe basic corporate formalities. *See, citing U.S. v. Gulf Park Water Co., Inc.*, 972 F.Supp. 1056 (S.D. Miss. 1997). In addition, when one corporation holds

its subsidiary out as a department of its business, or represents that it stands behind it, such is a factor to be considered in determining whether to disregard the separate entity of the subsidiary.

In this case, ACAI, as a holding company, has no employees. It has one subsidiary, ACA, which is its operating arm.[14] ACAI and ACA share officers, and indeed, one of its Board members, who was also the President and CEO of ACA, made the ultimate decision to terminate her employment.

ACAI itself has disregarded the separate identity of its subsidiary ACA in its dealings with the public, with the SEC, and with its employees. ACAI cannot now be heard to argue that it is not liable for the acts of ACA. I find that ACAI, for purposes of this proceeding, is the alter ego of ACA, that it certainly had the ability to affect Ms. Platone's employment, and that Ms. Platone is properly considered as an employee of ACAI for purposes of liability under the Sarbanes-Oxley Act.

Merits of the Claim

In a Sarbanes-Oxley whistleblower case, the Complainant must establish by a preponderance of the evidence that: (1) she engaged in protected activity as defined by the Act; (2) her employer was aware of the protected activity; (3) she suffered an adverse employment action; and (4) circumstances

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[14] ACAI formerly owned a company called AC Jet, but this subsidiary is now defunct.

are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. *Macktal v. U.S. Dep't of Labor*, 171 F.3d 323,327 (5th Cir. 1999). The foregoing creates an inference of unlawful discrimination, and with respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation.

When a whistleblower case proceeds to a formal hearing before an Administrative Law Judge, a complainant must demonstrate by a preponderance of the evidence that protected activity was a contributing factor in the unfavorable action alleged in the complaint. *See, Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999); *Dysert v. Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997). Once a complainant meets this requirement, she is entitled to relief unless the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior.

In *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the whistleblower protections of 5 U.S.C. § 1221(e)(1), the Court observed:

The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor

in a personnel action in order to overturn that action. *Id.* at 1140 (citations omitted).

If the Complainant meets this burden of proof, the Respondent may avoid liability by presenting evidence sufficient to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action. *Yule v. Burns Int'l Security Serv.*, Case No. 1993-ERA-12 (Sec'y May 24, 1995). While there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is higher than a preponderance of the evidence, but less than beyond a reasonable doubt.

If the Respondent is able to meet this burden, the inference of discrimination is rebutted. In order to prevail, the Complainant must show that the rationale offered by the Respondent was pretextual, i.e., not the actual motivation. *Overall v. Tennessee Valley Auth.*, Case No. 1997-ERA-53, ARB Nos. 98-111, and 128 (ARB April 30, 2001). As the Supreme Court noted in *St. Mary's Honor Ctr. V. Hicks*, 509 U.S. 502 (1993), a rejection of an employer's proffered legitimate, nondiscriminatory explanation for adverse action permits rather than compels a finding of intentional discrimination.

Protected Activity

"Protected activity," as defined under the Act and regulations, includes providing to an employer information regarding any conduct which the employee reasonably believes constitutes a violation of various fraud provisions of Title 18 of the U.S. Code (18 U.S.C. §§ 1341, 1343, 1344, or 1348), any rule or regulation of the SEC, or any provision of

Federal law relating to fraud against shareholders. The statutory language makes it clear that the Complainant is not required to show that the reported conduct actually constituted a violation of the law, but only that she reasonably believed that the Respondent violated one of the enumerated statutes or regulations. The standard for determining whether the Complainant's belief is reasonable involves an objective assessment.

Here, the Complainant argues that she engaged in protected activity by reporting her suspicions to her supervisor, Mr. Rodgers, and later to Michelle Bauman, including her suspicions that Mr. Rodgers, as well as ACA management, were complicit in a scheme to improperly compensate ALPA members, in an effort to obtain cost concessions in contract negotiations. The Respondent argues that the issues of flight pay loss raised by Ms. Platone were exclusively internal to ACA (Respondent's brief at 28), and alternatively, that the true victims of any such scheme are ALPA and its members, and that this was an internal union issue (Respondent's brief at 34). The Respondent also attempts to minimalize the effect of such a scheme, arguing that Ms. Platone only uncovered information about four pilots.[15]

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[15] Of course, these were the only records that Ms. Platone had been able to assemble on her own; she was not provided with the records that she requested.

At the time that the Complainant began looking into the issue of flight pay loss, and when she conveyed her suspicions to Mr. Rodgers and Ms. Bauman, the Respondent was in the initial stages of crucial contract negotiations with ALPA. The Respondent, as were other airlines, was feeling the effects of September 11, and was preparing to launch a new low-fare airline. Indeed, both Mr. Moore and Mr. Rodgers testified that it was critical to the future of ACA to cut costs. According to the Complainant, whose testimony on this score was not contradicted, ACA's major expenses of aircraft and fuel are relatively fixed. Labor is the only cost factor within the immediate control of the airline. The Complainant suspected that ACA management was attempting to improperly channel money to senior members of ALPA, indeed those who would represent ALPA in the upcoming contract negotiations, in order to convince these union officials to make contract concessions that would favorably affect ACA's bottom line.

Viewing the evidence as a whole, and factoring in my determinations on the credibility of the various witnesses at the hearing, I find that the Complainant's suspicions were reasonable, and that she had good grounds to believe that a fraud was being perpetrated on the airline as well as ACAI's stockholders.[16] Not only did the company documentation assembled by the Complainant

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[16] The statutes referred to in the Sarbanes-Oxley Act encompass mail, wire, bank, and securities fraud.

support such an inference, but the events surrounding her disclosure of her findings to Mr. Rodgers, and her attempts to follow up on her suspicions, buttress a conclusion that she had indeed uncovered fraudulent activity.

The Complainant first became aware of possible problems with flight pay loss in September 2002, when Tiffany de Ris, ACA's Manager of Crew Resources, informed her of discrepancies between ACA's and ALPA's records of pilots' hours. At that time, the Complainant told Ms. de Ris to hold off on further investigation while she looked into it. She then learned that ACA had not billed ALPA for flight loss since May 2002. The Complainant discussed the fact of the discrepancies with Mr. Rodgers and Ms. Yingling in October 2002, and Ms. Yingling and Ms. Platone were to set up a system to track flight loss. Mr. Rodgers expressed concern about the issue, and supported the Complainant's efforts to set up a tracking system. Over the next month, she regularly reported to Mr. Rodgers on her findings. She also discussed these discrepancies with Chris Thomas, the newly elected MEC chairman, in October 2002.

I find that it is reasonable to infer that over the course of several months, as she attempted to set up a system to track flight loss as she had been instructed, the Complainant tracked and documented what appeared to her to constitute an abuse of the flight pay loss system by ALPA members. Although she was not provided with the records she requested from the crew resources department in a timely manner, she was able to obtain and review some of these records on her own.

Her conclusions focused on members of the Master Executive Council, whose cooperation was a key element in the upcoming concessionary negotiations.

The Complainant discussed her findings with Mr. Rodgers, and on March 3, sent e-mails to Mr. Rodgers and Jennifer Schep, the Director of Crew Scheduling. Although she had not forwarded this information to Captain Thomas, and indeed had been specifically instructed by Mr. Rodgers not to relay her discoveries to him, Captain Thomas came to the Complainant's office the next day to ask her what she was doing, and why she was so "hot" on the flight pay loss issue.

I did not find Mr. Rodgers to be a credible witness. I had the opportunity to observe his presence and demeanor at the hearing, and I find several aspects of his testimony to be suspect. He essentially denied any conversation with the Complainant that was not memorialized in a letter or e-mail. Thus, he claimed that the first time he ever heard anything about flight pay loss was on March 3, 2003, when the Complainant sent him an e-mail asking for his input on the issue. I find that it strains credulity to accept that the Complainant, who reported to Mr. Rodgers on almost a daily basis, did not report her discoveries to him as she claimed.

The fact that Captain Thomas confronted the Complainant the day after she sent her e-mails to Ms. Schep and Mr. Rodgers certainly suggests that someone in the company told him what the Complainant was doing, and that he was not pleased.

Nor do I accept Mr. Rodgers' testimony that he did not instruct the Complainant to draft a letter to ALPA leadership setting forth ACA's position on flight pay loss. The Complainant did not write this letter out of the blue, and it is reasonable to infer that her drafting of the letter was triggered by instructions from her supervisor, Mr. Rodgers. Amazingly enough, although the Complainant forwarded her draft to Mr. Rodgers on March 6, 2003, he testified that he did not discuss it with Captain Thomas in their meeting, in spite of the fact that Captain Thomas had confronted the Complainant just two days earlier about her pursuit of this issue. Nor did Mr. Rodgers inform the Complainant about this meeting, which also included Michael Rops, a senior ALPA leader, whose time records and bid sheets the Complainant had targeted for review. According to Mr. Rodgers, the three of them discussed a few unspecified problems that ALPA was having with the Complainant, but the subject of flight pay loss was not discussed in this meeting. I find that Mr. Rodgers' testimony is not credible, especially given his comments to the Complainant on Monday, March 10, that the pilots were upset because she was harping on billing issues.

Although he had initially encouraged the Complainant to pursue this issue, and instructed her to draft the letter, the next day, after his meeting with Captain Thomas and Captain Rops, Mr. Rodgers told the Complainant that he was not interested in sending the letter. The Complainant asked if she could "take another stab" at writing the

letter, but he told her not to bother. He told her that there was no evidence of intentional wrongdoing, and that any potential flight loss was strictly an internal ALPA issue. He did not tell her about the meeting with Captain Thomas and Captain Rops. The Complainant sensed that she had struck a nerve; and, the factual circumstances suggest that she was correct.

Although she had presented documentation to support her suspicions, Mr. Rodgers summarily brushed her off. A review of the draft letter prepared by the Complainant shows that it did not accuse any specific persons of wrongdoing, but reminded ALPA of its obligations under the contract. Whether it was intentional wrongdoing or not, it was a problem that was costing ACA between $20,000 and $25,000 a month, and an issue that deserved attention.[17] It was not an internal ALPA issue, as Mr. Rodgers attempted to suggest at the hearing: improper flight loss claims came directly out of ACA's bottom line.

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[17] Mr. Rodgers testified that it was not possible to determine if the pilots involved were acting deliberately. However, given the information uncovered by the Complainant, as well as the potential loss involved, I find that the Complainant's concerns were reasonable, and deserved further investigation. Furthermore, the Complainant had concentrated her attention on instances where the union meetings were scheduled before "swap and drops" occurred, suggesting willful action on the part of the pilot.

Moreover, for a scheme involving improper flight loss claims to succeed, it was necessary, at the least, for ACA management to look the other way while the company was being defrauded.

The more rational inference to be drawn from the sequence of events is that the issue of flight pay loss **was** discussed by Captain Thomas, Captain Rops, and Mr. Rodgers on March 6, and that, in view of the upcoming concessionary contract negotiations, Mr. Rodgers agreed that nothing further would be done on the issue. Although the amounts of money at issue are significant, the Respondent presented no testimony that the flight pay loss discrepancies were ever resolved, or that ACA has billed ALPA for the arrearages in flight pay loss. Nor was there any testimony or evidence that the tracking system designed by Ms. Platone and Ms. Yingling, which would have prevented future abuses of the flight pay loss system, was ever implemented at ACA.

I find that Ms. Platone's sense that she had struck a nerve was eminently reasonable, and that she had a rational and reasonable basis for her belief that Mr. Rodgers, and perhaps others at ACA, were complicit in a scheme to compensate pilots improperly, in hopes of gaining contract concessions. Such a scheme, by its very nature, would involve the use of the mail and wires, and could constitute fraud on the ACAI shareholders. Contrary to the Respondent's argument, I find that a reasonable person would equate the manipulation of flight pay loss as a form of fraud against the Respondent, whose sole source of revenue was through ACA, or its shareholders. Thus, I find that Ms. Platone

engaged in protected activity under the Sarbanes-Oxley Act when she reported her suspicions to Mr. Rodgers, and then to Ms. Bauman.

Respondent's Knowledge of Complainant's Protected Activities

The Respondent argues that it was not aware of the Complainant's concerns about the flight pay loss issue, as required by the Sarbanes-Oxley Act, because the persons responsible for making the ultimate decision to terminate her were not aware of her allegations. The Complainant is not required to prove "direct personal knowledge" on the part of the employer's final decision-maker that she engaged in protected activity. The law will not permit an employer to insulate itself from liability by creating "layers of bureaucratic ignorance" between a whistleblower's direct line of management and the final decision-maker. *Frazier v. Merit Systems Protection Board*, 672 F.2d 150, 166 (D.C. Cir. 1982). Therefore, constructive knowledge of the protected activity can be attributed to the final decision-maker. *Id.*; *See also Larry v. Detroit Edison Co.*, No. 86-ERA-32, ALJ Dec. and Order at 6, October17, 1986; *Barlik v. TVA*, 88-ERA-15, Sec. Final Dec. and Order, Apr. 7, 1993.

Clearly, Mr. Rodgers was aware of the Complainant's allegations with respect to the flight pay loss issue. Ms. Platone testified that she informed Ms. Bauman of her suspicions, although Ms. Bauman recalled that the issue of flight pay loss was brought up only briefly. However, the

contemporaneous notes of Ms. Davis, who was also present at the initial meeting with Ms. Platone, reflect that the subject came up at least three times. Again, I find that Ms. Platone's testimony on this issue is credible, and it is supported by Ms. Bauman's testimony, as well as Ms. Davis' notes. Therefore, I find that Ms. Bauman and Ms. Davis, who were part of the group that debated whether to terminate Ms. Platone, were aware of her allegations.

However, there is no evidence that the issue of flight pay loss was discussed in subsequent meetings or discussions on Ms. Platone's fate. Thus, there is no evidence to suggest that Mr. Moore, who made the final decision to terminate Ms. Platone, knew of her allegations. But I find that the group that made the decision to suspend and terminate, and Mr. Moore, who ultimately carried out that decision, did not act independently of Mr. Rodgers, who initiated the process by notifying Ms. Bauman that the Complainant had complained of workplace hostility, and who also advised Ms. Bauman of the relationship between the Complainant and Captain Swigart. In effect, Mr. Rodgers planted the seeds for the Complainant's dismissal, being careful not to taint any other person among the group that debated Ms. Platone's fate with any knowledge of her protected activities. Mr. Rodgers actively participated in the discussions and decisionmaking regarding the Complainant's future employment. Under these circumstances, I find that it is appropriate to attribute constructive knowledge of the Complainant's protected activity to the ultimate decision-makers.

Adverse Action

There is no dispute that the Complainant suffered an adverse employment action – she was suspended and then terminated. Therefore I find that the Complainant has established that she suffered an adverse employment action at the hands of the Respondent.

Contributing Factor

I find that it is reasonable to draw the inference that, when Captain Thomas telephoned Captain Swigart on March 8, 2003, to tell him that ACA was investigating the Complainant, and reviewing her telephone records, Mr. Rodgers, or someone else at ACA, was already looking for a reason to fire her. Captain Swigart provided this excuse when he telephoned Mr. Rodgers and told him that he and the Complainant were dating. Interestingly, when the Complainant met with Mr. Rodgers the following Monday, he told her that ALPA was complaining about her "harping" on billing issues, and felt she was being obstructive, and that ALPA no longer wished to work with the company while she was employed there. But he did not bring up her relationship with Captain Swigart until the next day.

As noted above, I did not find Mr. Rodgers to be a credible witness, and I do not accept his testimony that he knew nothing of this relationship until March 8, 2003. Captain Swigart testified that, in his role as the MEC Chair, he dealt on a daily basis with

Mr. Rodgers, who was his contact person at ACA. According to Captain Swigart, whose testimony I credit over that of Mr. Rodgers, Mr. Rodgers helped him get into training classes when he learned that Captain Swigart planned to step down as the MEC Chair, and even discussed the possibility that Captain Swigart might come to work for ACA. According to Ms. Platone, whose testimony I also credit over that of Mr. Rodgers, when she was interviewing for her position with ACA, Mr. Rodgers repeatedly asked her about Captain Swigart's future plans. Under these circumstances, I find it inconceivable that Mr. Rodgers did not know the nature of the relationship between Ms. Platone and Captain Swigart.

But even if I were to conclude that Mr. Rodgers was completely ignorant of this relationship, I still find that the Complainant did in fact touch a nerve with her investigation of the flight loss pay issue, and her allegations were in fact a contributing factor in her dismissal. Based on the rapid sequence of events, as well as the Complainant's testimony, I conclude that ALPA objected to the Complainant's investigation which, if her suspicions were correct, would result in the termination of a practice that provided its pilots who were union representatives a significant source of additional income, and could possibly result in their termination. ALPA made these objections known, and virtually overnight, Mr. Rodgers, who had encouraged the Complainant in her investigation, and directed her to prepare a letter to ALPA, lost all interest in pursuit of the issue. ALPA made its position clear: it would not work with the company as long as the Complainant

was employed.[18] In other words, ALPA did not want the issue of flight pay loss pursued, and they did not want the Complainant in a position to continue pursuing it. All of this occurred in the context of extremely crucial concessionary negotiations that were scheduled for March 11, 2003, negotiations that, according to the Complainant, were unexpectedly cancelled.

Here, as in most cases of discrimination or retaliation, there is no direct evidence of intent. However, a complainant is not required to demonstrate specific knowledge that the respondent had the intent to discriminate against her. Instead, a complainant may demonstrate the respondent's motivation through circumstantial evidence of discriminatory intent. *See, Frady v. Tennessee Valley Authority*, 92- ERA-19 and 34 (Mar. 26, 1996); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

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[18] On March 7, shortly after he told the Complainant that he did not want to send her draft letter, Mr. Rodgers told her to remove the union negotiating committee members from the flight schedule for the following week, which is when concessionary negotiations had been scheduled to begin. Captain Thomas called the Complainant the following Tuesday and demanded that these pilots be placed back on the flight schedule, stating that the union had nothing further to discuss with the company at this time. The negotiations were subsequently cancelled.

The Board has noted that where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact-finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action. The Board noted that there will seldom be eyewitnesses to an employer's mental process, and that fair adjudication of whistleblower complaints requires a full consideration of a broad range of evidence that may prove or disprove a retaliatory animus, and its contribution to the adverse action. *See, Timmons v. Mattingly Testing Services,* 95-ERA-40, 5-7 (ARB June 21, 1996).

The Secretary has noted that, when addressing a complainant's proof of a prima facie case, one factor to consider is the temporal proximity of the adverse action to the time the respondent learned of the protected activity. *Jackson v. Ketchikan Pulp Co.,* 93-WPC-7 and 8 (Sec'y Mar. 4, 1996); *Conway v. Instant Oil Change, Inc.,* 91–SWD-4 (Sec'y Jan. 5, 1993). Findings of causation based on closeness in time have ranged from two days (*Lederhaus v. Dona Paschen Midwest Inspection Service, Ltd.,* 91-ERA-13 (Sec'y Oct. 26, 1992), to about one year (*Thomas v. Arizona Public Service Co.,* 89-ERA-19 (Sec'y Sept. 17, 1993). On the other hand, the lack of temporal proximity is a consideration, especially where there is a legitimate intervening basis for the adverse action. *Evans v. Washington Public Power Supply Sys.,* 95-ERA-52 (ARB Jul 30, 1996).

Furthermore, the plaintiff need not proffer direct evidence that unlawful discrimination was the real

motivation. Instead, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves v. Sanderson Plumbing Products, Inc*, 120 S.Ct. 2097, 2108 (2000).

Both Captain Swigart and Mr. Rodgers testified that, during their telephone conversation on March 10, Mr. Rodgers did not express any surprise when he was informed by Captain Swigart about his relationship with the Complainant. According to Ms. Bauman, Mr. Rodgers left her a voice mail message, but it did not include anything specific about this relationship. When the Complainant met with Ms. Bauman on March 12 to discuss her accusations of hostility, nothing was said about her relationship with Captain Swigart. Nor was the Complainant given a reason for her suspension the following day.

I do not accept Mr. Rodgers' testimony that the issue of flight pay loss abuse played no role in the decision to terminate the Complainant. Again, I did not find Mr. Rodgers' testimony to be credible. I conclude that flight loss was indeed discussed during Captain Thomas' and Captain Rops' visit to Mr. Rodgers' office on Monday, March 12, and that Captains Thomas and Rops expressed their unhappiness at the fact that Ms. Platone was looking into the flight loss issue. Indeed, they were so unhappy that they told Mr. Rodgers to put them back on the flight schedule the following day, which meant that the scheduled concessionary talks were cancelled.

I find that, faced with this situation, Mr. Rodgers

decided to use Captain Swigart's disclosure to his advantage, to get rid of Ms. Platone, who had become a liability in the ongoing negotiations. While Ms. Platone's relationship with Captain Swigart may well have constituted a sufficient and lawful reason to fire her, I find that Mr. Rodgers' motivation in initiating the process that ultimately led to Ms. Platone's dismissal was to prevent her from pursuing the flight loss issue.

Legitimate Nondiscriminatory Rationale for Adverse Action

I find that Complainant has demonstrated that her protected activity contributed to the Respondent's adverse employment action, and thus the Respondent has the burden to produce evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. The Complainant cannot prevail if the Respondent shows by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. In this case, the Respondent has put forth a nondiscriminatory rationale to justify terminating the Claimant—i.e., the Claimant's undisclosed relationship with Captain Swigart.

There is evidence in the record that ACA has employed spouses in the past, and in fact there is no specific prohibition in ACA's handbooks against such employment. Mr. Christy testified that he knew of romantic relationships between labor and management at ACA, and in his many decades with the union, he had never heard of anyone being fired for such a conflict. The difference in this case is that

Ms. Platone's position was created to establish a point person for ACA's dealings with ALPA; by its very nature, the position involved access to extremely sensitive information. Clearly, this was a position of trust. Indeed, in her hiring interviews, Ms. Platone was questioned closely about her ability to "switch sides," and give her loyalty to her new employer.

While the Respondent presented much evidence at the hearing purportedly establishing that Ms. Platone had breached the trust placed in her, I find that this evidence is irrelevant. The Respondent presented no evidence of any instance where Ms. Platone violated her obligations to her employer, and in fact she was not suspended or terminated for any reasons related to her performance.

Nor is it relevant that Captain Swigart was not in union leadership, or that he was on the outs with Captain Thomas, the MEC Chairman. The Claimant argues that she was not in a position to pass information to the union through Captain Swigart, and thus their relationship presented no conflict of interest. However, this misses the point—the Respondent clearly was concerned about Ms. Platone's ties to the union when she was hired, and the potential for future disclosure of sensitive information to a person with strong past ties to the union. The fact that she did not disclose her relationship with Captain Swigart, who up until October 2002 had been the MEC Chairman for many years, was a legitimate point of concern for the Respondent.

While the Claimant may feel that there was no actual conflict of interest, in that she had been and was able to perform her job, the Respondent perceived a breach of trust in her failure to disclose this relationship, as well as a conflict of interest in her continued ability to be loyal to her employer. I cannot substitute my business judgment for that of the Employer, or second-guess whether that decision was correct. I find that the Respondent had a legitimate, non-pretextual reason for dismissing Ms. Platone: her failure to disclose her relationship with Captain Swigart.

This does not, however, end the inquiry. Under the dual or mixed motive analysis, when the evidence establishes that discriminatory intent played a role in an adverse action, the employer may avoid liability only by demonstrating by clear and convincing evidence that the action would have been taken on the basis of a legitimate motive alone. The dual motive test comes into play if, as here, the complainant establishes a prima facie case, and there is evidence of both legitimate and improper motives for the adverse action. The employer bears the risk that the influence of legal and illegal motives cannot be separated. In a dual motive analysis, it is the employer's motivation that is under scrutiny. It is not enough that the evidence proves that the employer, in retrospect, made its employment decision on legitimate grounds.

Here, I find that it is not possible to separate the legitimate and the improper motives for Ms. Platone's suspension and termination. The decision to terminate Ms. Platone was debated and

ultimately made by a small group of persons, including Mr. Rodgers. I accept Ms. Bauman's testimony that Ms. Platone's allegations about flight pay loss did not play a part in her decision-making, and that the other members of this group, with the exception of Mr. Rodgers, were not aware of these allegations. But Mr. Rodgers got the train rolling, and he played an integral role in seeing that it reached its destination. I find Mr. Rodgers' testimony about performance issues, and his vague suggestions that there was a groundswell of discontent with Ms. Platone, to be self-serving and unpersuasive. I find that Mr. Rodgers initiated the process that resulted in Ms. Platone's suspension and termination, and made sure that it took place, in order to remove what he perceived as an obstacle to successful cost-cutting concessionary negotiations with the union.

Under these circumstances, I find that the Respondent has failed to meet its burden to show by clear and convincing evidence that it would have suspended and terminated Ms. Platone on the basis of her relationship with Captain Swigart alone, and thus the Complainant is entitled to relief under the Act.

CONCLUSION

Whether the Respondent actually violated, or intended to violate, any federal fraud statute or SEC ruling is not, and never has been, an issue in this case. All that the Sarbanes-Oxley Act requires is that the Complainant *reasonably believed* that the Respondent engaged in such conduct, that she

disclosed that conduct to the Federal authorities or to her employer, and as a result, she suffered an adverse employment action. Title 18 U.S.C. § 1514A(a). For all of the reasons set forth above, I find that the Complainant has demonstrated by a preponderance of the evidence that she was suspended and fired by the Respondent because she had uncovered and reported what she reasonably believed to be a pattern of improper flight loss payments to employees. In rebuttal, the Respondent has relied on the Complainant's failure to disclose her relationship with a fellow employee and past union representative to justify its dismissal of the Complainant. However, I find that the Respondent was also motivated by the Complainant's discovery of possible financial improprieties, and that the Respondent has failed to produce sufficient evidence to clearly and convincingly establish that its motive for firing the Complainant was unrelated to her protected activity.

REMEDIES

The Sarbanes-Oxley Act provides that any employee who prevails in an action under the whistleblower provision of the statute shall be entitled to all relief necessary to make the employee whole. Relief under the Act includes reinstatement, back pay with interest, and compensation for any damages sustained, including litigation costs, expert witness fees, and reasonable attorney fees. Title 18 U.S.C. § 1514A(c)(2)(A)-(C); 29 C.F.R. § 1980.109(b).

The Complainant has indicated that she does not

seek reinstatement with ACA. Based on my determination that the Respondent has violated the whistleblower provision of the Act, the Complainant is therefore entitled to back pay with interest payable at the rate established by the Internal Revenue Code. Since no evidence with respect to the Complainant's compensation was introduced during the formal hearing in this matter, the record will be held open for thirty days to allow the Complainant to produce evidence upon which an award of back pay may be calculated. Respondent may respond to any evidentiary submission made by the Complainant within fifteen days from the date upon which it receives the Complainant's evidence. To the extent that the parties believe that an evidentiary hearing is necessary with respect to the award of back pay, they should inform me of their desire for such a hearing immediately.

As a prevailing party, the Complainant is entitled to recover her litigation costs and expenses, including witness fees and reasonable attorney's fees. An itemization of such costs and expenses, including supporting documentation, must be submitted by the Complainant within thirty days from the date of this order. Respondent shall have fifteen days thereafter within which to challenge payment of the costs and expenses sought by the Complainant.

ORDER

IT IS HEREBY ORDERED that the Respondent, Atlantic Coast Airlines Holding Co., Inc., shall:

1. Pay to the Complainant back pay and interest in an amount to be determined by supplemental decision and order based on the parties' submissions as described above.

2. Pay to the Complainant all costs and expenses, including attorney fees, reasonably incurred in connection with this proceeding in an amount to be determined by a supplemental decision and order based on the parties' submissions as described above. A service sheet showing that service has been made upon Respondent must accompany Complainant's application. The petition for services and costs must clearly state (1) counsel's hourly rate and supporting argument or documentation therefore, and (2) a clear itemization of the complexity and type of services rendered.

SO ORDERED.

LINDA S. CHAPMAN, Administrative Law Judge

NOTICE: Pursuant to ¶ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002), authority and assigned responsibility to act for the Secretary of Labor has been delegated to the Administrative Review Board ("ARB") in review or on appeal of cases arising under the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. The Sarbanes-Oxley Act employee protection provision provides that complaints filed with the Secretary of Labor shall be governed by the rules and procedures set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. §

42121(b). Regulations directly governing Sarbanes-Oxley Act whistleblower complaints, however, have not yet been promulgated by the Department of Labor. In light of the absence of clearly governing regulations, the parties are advised that they should preserve their rights of appeal by filing in writing with the ARB, within ten business day of the date of this Decision and Order, any petition for review by the ARB. The ARB's address is Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave, Washington DC 20210. The petition should be served on all parties and on the Chief Administrative Law Judge.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BEFORE THE HONORABLE JUDGE WILLIAMS,
JUDGE TRAXLER, AND JUDGE GREGORY

STACY PLATONE v. UNITED STATES
DEPARTMENT OF LABOR. EQUAL
EMPLOYMENT ADVISORY COUNCIL; CHAMBER
OF COMMERCE OF THE UNITED STATES OF
AMERICA

Case No.: 07-1635

FILED: February 2, 2009
ISSUED: February 2, 2009

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Williams, Judge Traxler, and Judge Gregory.

For the Court
/s/ Patricia S. Connor, Clerk

APPENDIX E

AIN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

BEFORE THE HONORABLE MARY F. WALRATH

IN RE FLYI, INC ET AL

Case No.: 05-20011(MFW)

FILED: February 6, 2009
ISSUED: APRIL 13, 2009

REVISED ORDER GRANTING STACY M. PLATONE'S MOTION FOR RELIEF FROM AUTOMATIC STAY

Upon the motion of Stacy M. Platone ("Movant"), for the relief from the automatic stay, and adequate notice of the Motion having been given; and this Court being fully advised in the premises;

IT IS HEREBY ORDERED that the automatic stay be modified and Movant be allowed to liquidate her claim against Atlantic Coast Airlines Holdings,

Inc., n/k/a FLYi, Inc., by seeking grant of certiorari from the United States Supreme Court.

IT IS HEREBY FURTHER ORDERED that nothing herein shall prejudice the right of the Distribution Trustee to seek the entry of an order to either (i) disallow Claim No. 3922 pursuant to 11 U.S.C. § 502(b) or (ii) estimate the allowable amount of Claim No. 3922 pursuant to 11 U.S.C. § 502(c).

IT IS SO ORDERED this 13th day of April 2009.

The Honorable Mary F. Walrath

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(3)

Supreme Court, U.S.
FILED
OCT 16 2009
OFFICE OF THE CLERK

No. 09-55

In the Supreme Court of the United States

STACY PLATONE, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner did not engage in protected activity within the meaning of Section 806(a) of the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 548 F.3d 322. The decision and order of the Administrative Review Board (Pet. App. 11a-45a), and the recommended decision and order of the administrative law judge (Pet. App. 46a-114a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2008. A petition for rehearing was denied on February 2, 2009 (Pet. App. 115a-116a). The United States Bankruptcy Court for the District of Delaware granted petitioner relief from the automatic stay on April 13, 2009 (Pet. App. 117a-118a). The petition for a writ of certiorari was filed on July 13, 2009 (Monday).

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254(1). As explained below (see pp. 12-15, *infra*), there is a question whether the certiorari petition was timely filed.

STATEMENT

1. In order to restore investor confidence in the wake of the Enron and Worldcom corporate accounting scandals, Congress enacted the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, 116 Stat. 745. See S. Rep. No. 205, 107th Cong., 2d Sess. 2 (2002); H.R. Rep. No. 414, 107th Cong., 2d Sess. 18-19 (2002). Congress included whistleblower protection for employees of covered companies in Section 806(a) of the Sarbanes-Oxley Act, 116 Stat. 802 (18 U.S.C. 1514A). Section 806(a) prohibits such companies from retaliating against an employee because such employee provides information to a federal agency, to Congress, or to his employer "regarding any conduct which the employee reasonably believes constitutes a violation" of 18 U.S.C. 1341 (prohibiting mail fraud), 1343 (prohibiting fraud by wire, radio, or television), 1344 (prohibiting bank fraud), or 1348 (prohibiting securities fraud); any rule or regulation of the Securities and Exchange Commission; or any provision of federal law relating to fraud against shareholders. 18 U.S.C. 1514A(a)(1).

Congress charged the Secretary of Labor with investigating complaints of retaliation under Section 806(a), see 18 U.S.C. 1514A(b); 49 U.S.C. 42121(b), and the Secretary delegated that responsibility to the Assistant Secretary for Occupational Safety and Health (OSHA), see Secretary of Labor's Order No. 5-2007, 72 Fed. Reg. 31,160 (2007). After investigating a whistleblower complaint, the Assistant Secretary may either dismiss it as

lacking merit or make a finding of retaliation and order appropriate relief. 18 U.S.C. 1514A(b)(2)(A); 49 U.S.C. 42121(b)(2)(A).

The statutory standards governing retaliation complaints under Section 806(a) require a complaining employee to demonstrate that his having engaged in the protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. 42121(b)(2)(B)(iii). Even when a complaining employee satisfies that evidentiary hurdle, the Assistant Secretary may not order relief on the employee's behalf "if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of" the employee's engaging in the protected activity. 49 U.S.C. 42121(b)(2)(B)(iv).

The Department of Labor has promulgated regulations to govern the handling of complaints under Section 806(a). 29 C.F.R. Pt. 1980. Those regulations permit either a complaining employee or her employer to seek de novo review before an administrative law judge (ALJ) of an initial decision by OSHA on the complaint. 29 C.F.R. 1980.106, 1980.107. Either party may then seek discretionary review of the ALJ's decision by the Administrative Review Board (Board) of the Department of Labor. 29 C.F.R. 1980.110. Finally, either party may seek review of the Agency's final decision—either the ALJ's decision or the Board's decision if the Board has reviewed the ALJ's decision—in a federal court of appeals. 49 U.S.C. 42121(b)(4)(A); 29 C.F.R. 1980.110(b), 1980.112(a).[1]

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[1] In addition, an employee may file a de novo action in federal district court if "the Secretary has not issued a final decision within 180 days

2. In 2002, petitioner was hired as a manager of labor relations at Atlantic Coast Airlines (ACA), a wholly owned subsidiary of Atlantic Coast Airlines Holdings, Inc. Pet. App. 2a. At the time, petitioner was in a relationship with Captain John Swigart, who worked as a pilot for ACA and was a senior official with the Air Line Pilots Association (ALPA), the airline pilots' union. *Ibid.* Swigart recommended petitioner for the job, though it is not clear whether Jeffrey Rodgers—who was ACA's Senior Director of Labor Relations and Planning, and was petitioner's immediate supervisor—knew of the relationship when petitioner was hired. *Ibid.*

After petitioner began working at ACA, she noticed some discrepancies regarding the procedures (known as "flight-loss") according to which the pilot's union reimbursed ACA for time pilots spent at union meetings when they would otherwise have been flying. Pet. App. 2a-3a. Petitioner noticed both that ACA had not billed ALPA for several months of flight-loss and that some ACA pilots were intentionally scheduling flights during times when they knew they would be attending union meetings so that they would be paid even though they did not fly. *Ibid.* ALPA's policy was not to reimburse ACA for pilots' missed flight time on days on which the pilots were originally not scheduled to fly. *Id.* at 3a. Petitioner informed her supervisor and a pilot who served as a union official of what she had discovered, and both reassured her that the union would reimburse ACA for appropriate flight-loss time. *Ibid.*

Petitioner was not satisfied and presented her supervisor with a draft letter she had prepared to send to the

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of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant." 18 U.S.C. 1514A(b)(1)(B).

union official. Pet. App. 3a. Petitioner's supervisor informed her that he would not send the letter. *Ibid.* Several days later, petitioner met with ACA's Director of Employment Services, and again mentioned the flight-loss problem she had identified. *Id.* at 3a-4a. The handwritten notes of a participant in that meeting noted that the issue was raised, but did not indicate that petitioner made any allegations of fraud. *Id.* at 4a. The following day, petitioner met with senior airline officials, who suspended her with pay due to an unspecified conflict of interest. *Ibid.* Several days after that, petitioner was fired, ostensibly because of her relationship with Swigart. *Ibid.*

3. On April 3, 2003, petitioner filed a complaint with the Department of Labor, alleging that she was retaliated against for protected whistleblowing activity, in violation of Section 806(a) of the Sarbanes-Oxley Act. Pet. App. 4a. In that complaint, petitioner alleged that fraud was occurring at ACA in relation to the flight-loss reimbursement procedure. *Id.* at 4a, 27a. OSHA denied petitioner's complaint, finding that she failed to establish that she had engaged in protected activity. *Id.* at 4a.

4. Petitioner requested a hearing before an ALJ, who concluded that petitioner had engaged in protected activity because she had a reasonable basis to suspect that fraud was being perpetrated on ACA and its holding company's shareholders. Pet. App. 4a, 94a-100a. The ALJ found that petitioner had a reasonable basis for her belief that ALPA was defrauding ACA in a scheme to compensate pilots improperly, that such a scheme would involve use of the mail and wires, and that petitioner's supervisor and others at ACA were complicit in the fraud. *Id.* at 4a, 99a. The ALJ imputed

knowledge of petitioner's complaints to the managers at ACA who were responsible for firing her and concluded that petitioner's complaints were a contributing factor to her being dismissed. *Id.* at 4a-5a, 100a-110a.

5. ACA filed an appeal with the Board, which reversed the ALJ's determination. Pet. App. 5a, 11a-45a. The Board concluded that the ALJ had erred in concluding that petitioner had engaged in protected activity under Section 806(a) of the Sarbanes-Oxley Act. *Id.* at 5a-6a, 35a-45a. The Board first held that allegations of mail or wire fraud must involve conduct that is "at least * * * of a type that would be adverse to investors' interests" in order to be protected under the Sarbanes-Oxley Act. *Id.* at 33a; see *id.* at 5a. In addition, the Board held that, in order to be protected, petitioner's allegations must definitively and specifically relate to the categories of fraud and securities violations listed in 18 U.S.C. 1514A(a)(1). Pet. App. 5a, 36a.

Applying those principles to petitioner's claims, the Board concluded that her communications to ACA management regarding the flight-loss procedure were not "protected activity" because they did not communicate information specific enough to indicate possible fraud against shareholders. Pet. App. 5a, 36a-45a.[2] The Board went on to conclude that the "real victim" of any impropriety alleged by petitioner was the union because petitioner had received reassurances that ALPA would reimburse ACA for the flight-loss amounts. *Id.* at 5a, 43a.

6. Petitioner sought review in the court of appeals, which affirmed the Board's finding of no violation of Section 806(a) of the Sarbanes-Oxley Act. Pet. App. 1a-10a.

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[2] Petitioner asserts that the Department of Labor has conceded that she reported an ongoing scheme of mail and wire fraud. Pet. 4. There is no support for her assertion.

The court of appeals explicitly declined to decide whether the Board correctly limited 18 U.S.C. 1514A to protecting complaints of mail or wire fraud only if the alleged fraud would be adverse to the interests of shareholders or investors. Pet. App. 8a n.3. Instead, the court agreed with the Board that, in order to constitute protected activity under that statute, complaints to a supervisor must include "definitive and specific information regarding the alleged fraud that was taking place," and that petitioner "failed to make a proper allegation of fraud" to her supervisors. *Id.* at 8a-9a. Although petitioner successfully alerted ACA management to a "billing discrepancy," the court found that such a discrepancy, "without more, does not equal fraud, and [petitioner] failed to identify to ACA why she believed the actions related to the discrepancies would violate securities laws and constitute a fraud." *Id.* at 9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner asks (Pet. i) this Court to grant the petition for a writ of certiorari to decide whether Section 806(a) of the Sarbanes-Oxley Act, 18 U.S.C. 1514A, extends whistleblower protection to employees who complain of suspected corporate fraud "when the scheme is designed to defraud another party and not the company's shareholders." That issue is not presented in this case because the court of appeals expressly declined to reach it, resting its decision on an entirely independent ground that petitioner does not ask this Court to review.

Congress enacted the Sarbanes-Oxley Act in 2002 in the wake of various financial accounting scandals. Con-

gress included in Section 806(a) of the Act protection for whistleblowers who report various types of fraud and securities violations to a federal agency, to Congress, or to their supervisors. 18 U.S.C. 1514A(a). Specifically, Section 806(a) prohibits publicly traded companies from retaliating against an employee who provides information "regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [fraud by wire, radio, or television], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. 1514A(a)(1). In order to prevail on a claim of retaliation under Section 806(a), an employee must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer was aware of the protected activity; (3) she suffered an adverse employment action; and (4) the protected activity was a contributing factor in the unfavorable action. 29 C.F.R. 1980.104(b)(1); 18 U.S.C. 1514A(b)(2)(C); 49 U.S.C. 42121(b)(2)(B); *Allen* v. *Administrative Review Bd.*, 514 F.3d 468, 475-476 (5th Cir. 2008).

Petitioner asks this Court to grant her petition for a writ of certiorari to correct reasoning relied on by the Board in concluding that she had not engaged in protected activity and was, therefore, not a victim of retaliation prohibited by Section 806(a). The Board reasoned that petitioner had not engaged in protected activity in part because she had not complained of fraud that would adversely affect shareholders of ACA. Pet. App. 33a. That reasoning was expressly *not* adopted by the court of appeals, *id.* at 8a n.3, which affirmed the Board's finding of no violation based on the fact that petitioner's

communications to her supervisors did not clearly allege fraud against anyone, *id.* at 8a-10a. Thus, even if this Court were to grant the petition and agree with petitioner that the Board erred in stating that Section 806(a) protection is limited to employees complaining about fraud against shareholders, such a decision would have no effect whatsoever on petitioner's case. The court of appeals' determination—which petitioner neither challenges nor asks this Court to review—that petitioner failed to clearly communicate any allegations of fraud to her supervisors would remain and would continue to support the determination that petitioner did not engage in any protected activity.

Thus, the review petitioner seeks is both unwarranted and unavailable. This Court reviews judgments, not the reasoning behind the judgments. See, *e.g.*, *Rutan* v. *Republican Party*, 497 U.S. 62, 76 (1990); *Smith* v. *Phillips*, 455 U.S. 209, 215 & n.6 (1982). The Court should decline to review certain reasoning in an agency decision below when that reasoning was not even adopted by the court of appeals that affirmed the agency's ultimate determination.

Although petitioner seems to acknowledge that it is the Board's reasoning she asks this Court to review rather than the court of appeals' reasoning, see Pet. 13-15 (discussing the Board's decision), she also claims that the court of appeals "impliedly adopted the [Labor] Department's *Platone* rule—that the statute protects the reporting only of frauds against shareholders." Pet. 11-12. That contention is directly contradicted by the court of appeals' opinion, which explicitly states that the decision does not reach the portion of the Board's opinion purporting to "require the complainant, when alleging mail or wire fraud, to demonstrate that the fraud would

be adverse to the interests of shareholders or investors," but rests instead on "alternate grounds." Pet. App. 8a n.3. Indeed, the court of appeals highlighted the limited nature of its ruling, stating that its holding "does not heighten the requirements for a complainant's prima facie showing or otherwise change the burden-shifting regime for Sarbanes-Oxley whistleblower actions." *Id.* at 9a; see also *id.* at 10a ("We hold only that a complainant must alert management to more than the fact that the company's near-term profits were affected by billing discrepancies in order to meet the standard of definitively and specifically alleging mail or wire fraud.")

2. Even if the issue petitioner asks this Court to decide were actually presented in this case, it would not merit the Court's review because there is no disagreement among the courts of appeals about whether Section 806(a) protects employees who report fraud against entities other than shareholders. Petitioner's contention (Pet. 16-20) that there is such a circuit split is misguided.

Petitioner asserts that three other courts of appeals have held that Section 806(a) of the Sarbanes-Oxley Act protects only whistleblowers who are complaining of fraud against shareholders.[3] She is mistaken. The First Circuit in *Day* v. *Staples, Inc.*, 555 F.3d 42 (2009), held that an employee who alleged retaliation for reporting suspicions of fraud against shareholders had not en-

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[3] Petitioner also claims (Pet. 18) that the district court's decision in *Van Asdale* v. *International Game Technology*, 498 F. Supp. 2d 1321 (D. Nev. 2007), supports the Board's reasoning in this case. However, the Ninth Circuit reversed that decision after petitioner filed her petition. 577 F.3d 989 (2009). Neither the district court nor the court of appeals in that case specifically addressed the issue for which petitioner seeks review by this Court.

gaged in protected activity because he did not have a reasonable belief that the company or anyone it employed had engaged in fraud against shareholders. *Id.* at 56-58. But the court did not hold that Section 806(a) protects only allegations of fraud against shareholders; rather, the employee in that case happened to have been complaining about activity he claimed to believe was fraud against shareholders. *Id.* at 54-55. The court specifically expressed the view that Section 806(a) protects complaints of mail fraud and wire fraud independent of whether such fraud is against shareholders. *Ibid.*

Nor did the Fourth Circuit's decision in *Livingston* v. *Wyeth, Inc.*, 520 F.3d 344 (2008) (cited at Pet. 18), hold that protected activity under Section 806(a) is limited to complaints about fraud against shareholders. Rather, the employee in that case also alleged that he had complained about conduct that constituted fraud against shareholders. *Id.* at 350-351. The Fourth Circuit held that the employee did not have a reasonable basis to believe that any such fraud existed, and had, therefore, not engaged in any protected activity. *Id.* at 354-355. But the Fourth Circuit, like the First Circuit, did not purport to address whether the Sarbanes-Oxley Act's whistleblower protection would protect an allegation of mail or wire fraud against an outside third party, rather than against the company's shareholders.

Petitioner similarly errs in her characterization of the Seventh Circuit's decision in *Harp* v. *Charter Communications, Inc.*, 558 F.3d 722 (2009), which held that the employee did not engage in protected activity under Section 806(a) because she did not have a reasonable belief that fraud was being committed by her company. Although the employee in that case argued to the court of appeals that her company had engaged in activity that

may have constituted fraud against a municipality, the employee admitted that she had not known of such activity at the time of the events at issue in the case and had, therefore, not complained of such activity to her employer or to anyone else. *Id.* at 726. On that basis—that the employee neither knew of nor complained of any fraud against a municipality—the court of appeals characterized such fraud as not being "the basis for the Sarbanes-Oxley challenge." *Ibid.* (cited at Pet. i7-18 & n.22). But that statement was a factual description of the claims before the court in that case, not a legal description of the types of claims that could or could not be raised in other cases.[4]

In addition, the actual basis for the court of appeals' conclusion in this case—that, in order to constitute protected activity, an employee's communications must definitively and specifically relate to one of the categories of fraud or securities violations listed in 18 U.S.C. 1514A(a)(1)—is in accord with every other court of appeals to consider that issue. See *Van Asdale*, 577 F.3d at 996-997; *Day*, 555 F.3d at 56; *Allen*, 514 F.3d at 476-477.

3. Finally, there is a question whether petitioner's certiorari petition was timely filed. Supreme Court Rules 13.1 and 13.3 require that a petition for a writ of

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[4] Petitioner points to two district court cases that have disagreed with the Board's reasoning below that allegations of fraud must be of fraud against shareholders in order to qualify as protected activity under Section 806(a). See Pet. 19-20 & nn.24, 25, 27 (citing *Reyna* v. *ConAgra Foods, Inc.*, 506 F. Supp. 2d 1363, 1382 (M.D. Ga. 2007), and *O'Mahony* v. *Accenture Ltd.*, 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008)). The fact that the only conflict petitioner can identify is between the Board's decision in this case on one hand and the decisions of two district courts on the other highlights why review by this Court is not warranted.

certiorari be filed within 90 days after a court of appeals denies a petition for rehearing en banc. Rule 13.5 allows a Justice of the Court to extend the period for filing a certiorari petition for up to 60 additional days, for good cause shown. In the absence of extraordinary circumstances, such an application must be filed at least 10 days prior to the date the petition is due. For civil cases, these time limits are set out by statute. 28 U.S.C. 2101(c). Rule 13.2 indicates that a failure to comply with the time limits in Section 2101(c) renders a petition "jurisdictionally out of time." And this Court has repeatedly held in civil cases that the statutory time limit is jurisdictional. See, *e.g.*, *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 90 (1994); *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

In this case, the petition for rehearing en banc was denied on February 2, 2009. Petitioner requested that the bankruptcy court lift the automatic stay so that she could file a certiorari petition on February 6, 2009, and the bankruptcy court signed an order granting petitioner's motion on April 13, 2009. See No. 05-20011 Docket entry No. 2742 (Bankr. Del. Feb. 6, 2009) (request to lift stay to file petition for writ of certiorari docketed); *id.* No. 2763 (Apr. 13, 2009) (order lifting stay signed). At that point, 20 of the 90 days for filing a certiorari petition remained. In those 20 days, petitioner neither filed her petition for a writ of certiorari nor asked this Court for an extension of time within which to do so. She then filed her certiorari petition 91 days (on a Monday) after the bankruptcy court issued the order lifting the automatic stay for the purpose of allowing her to file a petition.

Section 108(c) of the Bankruptcy Code extends fixed time periods "for commencing or continuing a civil ac-

tion in a court other than a bankruptcy court on a claim against the debtor." 11 U.S.C. 108(c). The statute provides that such a time period shall not "expire until the later of—(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the [automatic] stay." *Ibid.* The weight of authority holds that the "suspension" mentioned in Subsection (1) does not refer to the automatic stay itself, but must result from a provision of state or federal law outside the bankruptcy code that suspends a fixed time period during the pendency of a bankruptcy proceeding. 2 *Collier on Bankruptcy* ¶ 108.04[2], at 108-15 to 108-16 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006); *Rogers* v. *Corrosion Prods., Inc.*, 42 F.3d 292, 297 & nn.6-7 (5th Cir.) (collecting cases), cert. denied, 515 U.S. 1160 (1995). If that interpretation is correct, Subsection (1) has no bearing on the time for filing a petition for a writ of certiorari, and petitioner should have filed her petition within 30 days of the bankruptcy court's order lifting the stay for the purpose of filing the petition pursuant to Subsection (2). She did not. However, as this Court has noted, the lower courts are somewhat divided over whether Section 108(c)(1) contains a tolling provision. *Young* v. *United States*, 535 U.S. 43, 52 (2002).[5] If it does, petitioner's 90-day period of time in which to file a certiorari petition would not have commenced running until the bankruptcy court lifted the stay, and her peti-

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[5] The United States argued in *Young* that "Section 108(c) tolls the limitations period for a nonbankruptcy cause of action that has not yet run at the time the debtor's petition is filed." U.S. Br. at 18, *Young*, *supra*, (No. 00-1567). The government's brief did not, however, distinguish between paragraphs (1) and (2) of Section 108(c).

tion would be timely. Rather than potentially "confront a procedural obstacle unrelated to the question presented," *DTD Enters., Inc.* v. *Wells*, No. 08-1407, 2009 WL 3255157, at *1 (Oct. 13, 2009) (Kennedy, J., concurring in denial of petition for writ of certiorari), this Court should deny the petition for this reason as well as the others stated above.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2009

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No. 09-55

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent does not address the central issue in this case: whether a publicly traded company can lawfully terminate an employee who uncovered a corporate fraud so long as the corporation itself was not a direct victim of the fraudulent scheme. Instead, Respondent curiously misreads the effect of the court of appeals ruling, and more importantly, this Court's proscription against affirming an administrative decision on alternate grounds. In addition, Respondent suggests there may be an issue of timeliness, while citing this Court's plain decision that resolved essentially the same question claimed to exist.

If allowed to stand, the decision will permit corporations to suppress and punish honest employees who report corporate crimes and will inevitably make law enforcement's investigation of those already challenging and difficult-to-prosecute offenses all the more formidable.

A. The Court Of Appeals Decision Violated The *Chenery* Doctrine And Affirmed An Unreasonable Interpretation Of The Sarbanes-Oxley Whistleblower Provision

Respondent does not address the *Chenery*[1] violation by the court of appeals, but instead argues that by deciding the case on alternate grounds, the court of appeals insulated the central issue from review. In so doing, Respondent refers to, but appears to misunderstand, a central tenet of Supreme Court review, that the Court reviews judgments, not opinions. It should be clear that Petitioner seeks review of the court of appeals judgment that upheld the Labor Department's final decision and the creation of the *Platone* Rule as the rationale for its decision. That the court of appeals chose not to review the Department's basis for its decision does nothing to lessen the appropriateness of review by this Court.[2] Remarkably, without

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[1] *SEC v Chenery*, 332 U.S. 194 (1947).

[2] Respondent chooses to defend the court of appeals alternate grounds for affirming the Department, that the entire case turned on a "billing discrepancy," but does not address the lack of record support for the court's conclusion. Indeed, the Department itself noted in its final decision that "While [Platone] expressed her belief that the pilots were cheating the company out of money, the real victim of any alleged

mentioning *Chenery*, the Department appears to suggest that the Court impliedly overruled the Doctrine in *Smith v. Phillips*, 455 U.S. 209 (1982), a case not involving review of an administrative decision but of federal habeas ruling. Likewise, the other case cited by Respondent, *Rutan v. Republican Party*, 497 U.S. 62 (1990), did not involve review of an administrative decision but related to allegations of First Amendment violations in Illinois state personnel actions.

Finally, Respondent does not address two compelling reasons for granting the petition, that the court of appeals decision lets stand an unreasonable interpretation of the Sarbanes-Oxley Act that denies protection to employees who report ongoing corporate fraud and that this important issue is likely to recur with some frequency.

Rather, Respondent focuses its brief on disputing the division among lower courts on the meaning of the statute. In particular, Respondent mischaracterizes the First and Seventh Circuit decisions set forth in the petition, and it suggests there is no case law in accord with the Department's narrow interpretation of the Act's whistleblower protection.

In truth, the *Platone* Rule stands as a refuge for corporations seeking to conceal criminal activity and the court of appeals judgment allowing the

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impropriety was ALPA (the Air Line Pilots Association)." Pet. App. 43a. It is also important that the ALJ's findings of fact made it clear that the billing discrepancy was purposeful and that Platone's employer was complicit in the scheme. Pet. App. 94a, 99a.

Department's decision to stand is worthy of review by this Court.

B. The Petition For A Writ Of Certiorari Was Timely Filed

The Respondent acknowledges that the Court's decision in *Young v. United States*, 535 U.S. 43 (2002), plainly held that the principle of equitable tolling is firmly rooted in bankruptcy law. "It is hornbook law that limitations periods are 'customarily subject to equitable tolling,' unless tolling would be 'inconsistent with the text of the relevant statute.' Congress must be presumed to draft limitations periods in light of this background principle. That is doubly true when it is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and 'appl[y] the principles and rules of equity jurisprudence.'" 535 U.S. at 49-50. (Citations omitted). Respondent states that, when *Young* was decided, "the lower courts were *somewhat* divided over whether Section 108(c) contains a tolling provision," but apparently concedes that in *Young*, the Court found it unnecessary to resolve that question in light of its decision regarding equitable tolling. Most significantly, Respondent concedes that, if *Young* applies with equal force in this case, the "petition would be timely." Opp. 15. (Emphasis added).

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

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